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In the

Supreme Court of the United States

October Term, 1967

857

Docket No. 30989

JAMES MILLER, a/k/a FRANK JAMES COPPOLA

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, The Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 26, 1967.

OPINION BELOW

The opinion of the Court of Appeals, Moore, *Friendly* and Feinberg, Circuit Judges, is reported in 381 F 2d 529. The full text of the opinion is set forth in Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on July 26, 1967. Rehearing was denied on September 26, 1967. The time for filing a petition for Writ of Certiorari was extended to November 25, 1967, by Associate Justice John M. Harlan. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether a defendant gets an impartial trial by jury when three of the jurors learn that someone is going to beat them up after the trial, and the Judge merely makes a perfunctory in camera inquiry as to whether the jurors believe they are prejudiced.

2. Whether a defendant gets a fair trial when he is indicted under a patently phony alias allegation. The court refuses to strike the false name, and the prosecution is permitted, on rebuttal, to introduce an eighteen-year-old criminal record having nothing to do with the case.

3. Whether a defendant may constitutionally be convicted of conspiracy to smuggle narcotics solely upon proof of possession of narcotics "unless the defendant explains the possession to the satisfaction of the jury."

4. Whether the Government may lawfully destroy evidence of innocence before the defendant is even arrested and may withhold Jencks Act documents which would reveal that its identification witness was, contrary to his claims, promised a pardon.

5. Whether the Government may lawfully convict a man despite prejudicial, inflammatory newspaper publicity, telephone tapping, and basic unfairness.

STATUTE INVOLVED

The statutory provision involved is Title 21, United States Code, Section 174. It is printed in Appendix A hereto.

STATEMENT

On August 20, 1963, Joseph Michel Caron arrived at the Bridgeport Motor Inn, in the company of his wife, Ida, from Montreal, Canada. Upon arrival he had been instructed to leave his car keys and registration in the car parked in the lot adjacent to the motel.

On that day, a man appeared at the door for about a minute and gave Caron $50.00. Contrary to instructions, Caron drove around Bridgeport, Connecticut, that evening. The next morning he received a phone call and was told not to move his car; and that there would be a delay before it was picked up. On August 22, 1963, the car was missing in the afternoon. Around 4:00 or 5:00 P.M. the contact man again appeared at Carno's motel room for about a minute, gave Caron another $50.00 and the car keys and left.

On his return to Montreal, Caron was asked by Rivard, his boss, "How's Frankie my friend?", referring to the Bridgeport contact. Moreover, although none of the statements made by Caron to the Government mention it, and Caron is first recorded as saying it in the Texas trial, almost two years after his arrest, Caron stated that Rivard told him that "Frankie" is "a hairdresser."

On September 21, 1963, Caron returned to the Bridgeport Motor Inn. On this trip from Montreal, he was accompanied by his wife, Ida, and three of their four children. After checking into the motel around 1:00 P.M., Caron and his family went to the Green Comet Diner, next door to the motel, to eat lunch. While eating, "Frankie," together with another man, interrupted Caron's lunch and suggested that the three of them have a cup of coffee together. Shortly thereafter Caron and "Frankie" drove off in Caron's car. About 1,000 feet away Caron got out. That afternoon, around 5:00 P.M., the Carons found the car parked in the motel parking lot.

On both trips it was claimed by the Government that the Caron car was carrying large quantities of heoin. Caron identified the defendant as the contact man on both trips.

Upon returning to Montreal, Caron was told that he was going to make a trip to Mexico City, Mexico, in October, 1963. This time he was accompanied by his wife, Ida. On October 10, 1963, on the return trip from Mexico City, in the course of a routine inspection at the International Bridge, in Laredo, Texas, Caron and his wife were arrested for smuggling approximately 76 pounds of 99.8% pure heroin into the United States in the back seat and side panels of their car.

Shortly after he and his wife were arrested, Caron began to tell Federal and Canadian authorities of his narcotic smuggling activities. On October 16, 1963, he described Bridgeport "Frank" as "between thirty-eight and forty-two, about five feet ten in height, American man of Italian or Jewish background or ancestry, Roman nose, curly black hair, dark complexioned." (The defendant is neither Italian or Jewish, does not have a Roman nose, and is not dark complexioned.) He identified a photograph of one Frank Mancuso of New York

as the Bridgeport man. Around the same time, he was shown several photographs of the defendant, and he said that while they looked like the man, he was not certain and would have to see him in person.

During this period, Caron displayed concern that his wife was under arrest, and that his children were in Montreal. Mrs. Caron was released, and together with her children, she was kept in protective custody through May, 1966.

In December, 1963, Caron entered a guilty plea to smuggling narcotics in the Federal Court in Laredo, Texas. The charges against Mrs. Caron had been dismissed and in January, 1964, she was granted immunity. While awaiting sentencing, Caron was brought to Connecticut, in February, 1964, to identify the defendant. On the first day Caron was unable to make an identification when he saw the defendant. That night he was interviewed in detail by the Connecticut State Police. The next morning Caron was taken to a point behind the defendant's place of business. He then made an identification. He was returned to Texas and sentenced to 10 years in prison.

A grand jury had indicted the Canadian group, in January, 1964. In March, 1964, the defendant was indicted in a single indictment. This indictment was never acted upon. After Caron insisted on immunity and it was granted, in May, 1964, a third indictment charging this defendant, the Canadians, and the Mexican parties with conspiracy to smuggle narcotics was returned at Houston, Texas.

At about this time, the Customs Service condemned the 1962 Chevrolet that Caron had used on both Bridgeport trips and the Mexican trip. After condemnation, the car was used by the Customs Service along the Mexican border.

Armed with a bench warrant issued on the May, 1964 indictment, on June 19, 1964, a horde of State and Federal agents descended on a women's beauty parlor to arrest the defendant. Thus, the defendant found he was supposed to be "Frank James Coppola, alias James Miller." At the same time, the press was being afforded a "story" that was patently false, garrish in format, and intentionally inaccurate, by the Federal Investigative Agency in charge of the case. In fact, a newspaper automobile accompanied the agents to the scene of the arrest.

After a removal hearing — or what was an appeal from a claimed removal hearing — the defendant was admitted to bail. There followed a series of letters, telephone calls, and conferences with the Government in which the defense asserted the defendant was innocent and asking for and being assured that all leads that the defense could find would be checked. Among the items requested by the defense was the Caron car. The defense was not told that it had been condemned and put into Government service.

Arraignment was delayed for a year because of delays occasioned by the Canadian rendition proceedings. After arraignment, the defense filed motions to strike the alias allegation, for a separate trial, for a bill of particulars, to transfer the case to Connecticut, to dismiss because of induced and false newspaper noteriety, for a severance and separate trial, to dismiss the indictment for jurisdictional reasons, and for discovery. Except for the production of motel records, a disclosure that Caron had identified Mancuso, and an order to produce the Caron car, all of the motions were denied without hearing. A Writ of Prohibition was issued by the Fifth Circuit and the defendant was severed and granted a separate trial, in August, 1965.

In September, 1965, it was determined for the first time that the car had been materially altered from its condition at the time of Caron's arrest. The alteration resulted from its use for 18 months by the Customs Service.

In February, 1966, the defense renewed the motion to strike the alias allegation. This was denied when the Government stated that the alias was an "integral part of the Government's case." A bill of particulars was denied. This time the motion to transfer, in order to support it, required the defense to disclose the names and addresses of every potential defense witness. Only then was the motion granted. The affidavits then made it clear that it would cost over $200,000 just to house and transport the witnesses.

After the case was transferred, the defense re-asserted a request for a bill of particulars, moved to again strike the alias allegation, and for relief from the effect of the newspaper stories. After the bill of particulars was filed, all other motions having been denied, the defense asked for a continuance to prepare the defense keyed to the time set forth in the bill of particulars. This was denied.

The defense was also of the belief that Caron was promised a pardon; that money was being spent to support Mrs. Caron and the children; and, that both Caron and his wife had been made promises of citizenship and of permanent residence in the United States. The court denied all of this discovery except for payments. These disclosed that Mrs. Caron and the children had been paid approximately $5,800.00 to April, 1966.

At the trial, Caron recounted his two trips to Connecticut and the details of his Mexican venture. He persistently contended, among other things, that he had been made no promises

of leniency for testifying. It also appeared that in a private letter to his wife, in March, 1966, he said that he had lied in his identification of the man he called Frank, at Bridgeport, Conn., that he didn't know "Frank." The Government insisted that no such promise of leniency had been made, although 19 days after the trial concluded, the balance of Caron's 10-year prison term was commuted and he was set free.

The trial saw the alias come up in rebuttal only. Then it was established by means of an 18-year-old arrest record, totally unconnected with the charge of narcotics conspiracy, and upon the legal basis that Wilkes-Barre police records are business records of the F.B.I.

The defendant did not testify at the trial. His defense was based on the testimony of about 20 persons who, corroborated by business records, placed him 15 miles away at the times Caron transferred his car to "Frank."

After the trial, while the matter was pending appeal, the defense received a written confession from a man it suspected of having committed the crime. The man who confessed fits perfectly the description given by Caron of Bridgeport Frank. This information, together with narcoanalysis and polygraph examinations of the defendant, and other evidence connecting the confessor to the crime, were disclosed to the Government. Defendant requested the Court of Appeals to postpone its consideration of the petition for rehearing until the investigation by the Government and the defense could be completed and a new trial motion ruled upon. The supporting information and affidavits were conveyed to the Court of Appeals as part of that motion and are, therefore, part of the record below. The Court of Appeals summarily denied the motion, and the petition for rehearing, on September 26, 1967.

REASONS FOR GRANTING THE WRIT

I

IN HOLDING THAT THE EFFECT OF JUROR THREATS DURING THE COURSE OF THE TRIAL IS DISSIPATED WHEN THE JUDGE CONDUCTS A PERFUNCTORY IN CAMERA INQUIRY AS TO WHETHER THE JURORS BELIEVE THAT THE THREATS WILL INTERFERE WITH THEIR DECISION, THE COURT BELOW DISREGARDED THIS COURT'S COMMANDS IN *REMMER V. UNITED STATES* AND DENIED THE DEFENDANT AN IMPARTIAL TRIAL BY JURY.

When the trial was in its fourth week, the deputy clerk informed the judge that threats had come to the attention of some jurors. The judge informed counsel and it was agreed that the judge should inquire to determine the exact nature and source of the threat. Defense counsel expressly urged the court to make the inquiry of the jurors individually and the court agreed to do so. After the inquiry, the judge sealed the transcript and denied the defense's motion for a mistrial. It was not until after the trial; indeed, the day of the hearing on the motion for new trial, that the transcript was disclosed to counsel. It was then learned that the judge had not made the inquiries in the manner in which he had agreed, but had questioned the three jurors together. It was also learned that one of the jurors had been told at a dinner party, "I'm just going to warn you that another man in Litchfield told me that when this is over, that unless you're very careful, that there is a bunch here in Torrington who are going to get after you and beat you up. They don't want to kill you, but they don't like what is going on" (1462a).* The juror who heard this threat then

* References are to Appellant's Appendix below.

discussed it with the two other jurors, in violation of repeated admonitions during trial not to discuss the case.

The trial judge's response to these revelations was to ask the three jurors, in a group, if the threat would "have any effect upon you to decide the case on the evidence . . ." (1463a). The jurors knew that if they didn't want to bear the onus of a mistrial for their own failure to keep their oaths, they had to answer that if would have no effect, and that is what they said. One of the jurors, however, at the urging of another, told the judge that there were two places in Torrington where "dope" was "being peddled" (1464a). It was thus clear that the jurors thought that the dope peddlers in Torrington and the "bunch in Torrington" that was going to beat them up was one and the same. It was also clear, or should have been, that since the jurors attributed the threats to dope peddlers, they were clearly influenced by the threat in believing that the defendant was connected with dope peddling, *i.e.*, guilty. Yet the Court inquired as follows:

> Court: What you are saying is that it may not be a kidding rumor. Somebody may have talked?
>
> Mr. Lester: No, I don't think so.
>
> Mr. Parsons: No, sir. Possibly, but that doesn't affect me any, only to the extent that I have grandsons, and so forth.

This meaningless exchange wholly fails to determine what relationship the jurors saw between the dope peddlers and the threat, and leaves entirely unexplored why the juror was concerned about his grandsons. The poison was not in the silightest removed by the inquiry.

The trial judge's primary concern was clearly expressed to the jurors: "Well, the thing I am most concerned about in this case, naturally, is that we have spent five weeks on it and I don't want to see it go down the drain . . ." (1456a). That the judge was less concerned about protecting the defendant than he was in getting a conviction is indicated by his statement after the trial. "Well, they certainly didn't succumb to the threat, did they? . . . they didn't vote for an acquittal. They voted for conviction." (1539a).

On the day that the transcript of the colloquy with the jurors was first made available to defense counsel, it was pointed out to the court that an effort had been made by the defense to investigate the influence of the threats on the jurors and that the defense had been told by the jurors' attorney that the judge had said that they should refuse to discuss the matter until the judge so ordered (1541a).* A request for a postponement of the new trial motion and permission to investigate was denied.

This Court has long held that "in a criminal case, any private communication with a juror during a trial about the matter pending is . . . presumptively prejudicial . . . [and] the burden rests heavily upon the government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant." *Remmer v. United States*, 350 U.S. 377, 379. See also *Mattox v. United States*, 146 U.S. 140, 147, *Gold v. United States*, 352 U.S. 985. It is reversible error if the court fails either to "determine the circumstances . . . in a hearing with all interested parties permitted to participate" *Remmer v. United States, Supra*, or if,

* The Court of Appeals thought that the suggestion that the jurors not cooperate in an investigation came from an attorney. The Court was mistaken; the "suggestion" came from the trial judge.

after conducting such a hearing, the record fails clearly to show the communication could not have influenced the juror. *Remmer v. United States*, 350 U.S. 377.

The court below in essence held that it is enough that the judge asks the jurors if they will be influenced and they say no. Yet, it is clear that they were under heavy pressure by the Court's remarks and by their own awareness of having created the problem by violating their oaths, to deny influence. Indeed, it would be fanciful in the extreme to suppose that a juror, no matter how prejudiced, would admit it. The decision below rips the heart out of *Remmer* and leaves any defendant's fate in the hands of rumor mongers.

The court below also patently erred when it held that the defendant had "expressly waived" his right to be present and participate in a hearing. Yet, as the record shows, all that was waived was the right to be present while the court determined the nature of the communication. Even this narrow waiver was accepted by the trial judge with knowledge of the defendant's express reservation of the right to conduct an investigation after the trial (1368a) (subsequently refused by the court), and upon the judge's own representation (upon which he reneged) that the inquiry would be made individually (1388a).

The decision below so clearly undermines a defendant's right to impartial trial by jury that it should be summarily reversed.

II

IN TRYING THE DEFENDANT UNDER A PHONY ALIAS ALLEGATION AND INTRODUCING AN IRRELEVANT EIGHTEEN-YEAR-OLD CONVICTION FOR LAR-

CENY, THE GOVERMENT DENIED THE DEFENDANT A FAIR TRIAL AND ROBBED HIM OF THE PRIMARY VALUE OF HIS RIGHT NOT TO TAKE THE STAND.

Although it well knew that the defendant's name was James Miller, the Government indicted him as "Frank James Coppola, alias James Miller" and provided the press with information from which it was announced that the defendant was "masquerading as a legitimate businessman . . . under the legally changed name of James Joseph Miller." The defense moved prior to trial to strike the name "Frank James Coppola," accompanying the motion with certified copies of his birth certificate, naval records, VA records, and his marriage certificate, all of which stated his name to be James Miller. The Government responded by claiming that the name "Frank James Coppola" was an "integral part of its case" against the defendant, and the motion was denied. The motion was renewed in Connecticut and again denied. Yet the only way in which the allegation was "integral" was that it tied in neatly with the press coverage and was also a more fitting name for a narcotics smuggler.

At the trial, no evidence that the defendant had ever used the name Frank, Frankie, Frank James Coppola, Frank Coppola, or anything of the sort was offered in the Government's case-in-chief. A motion to strike the name was renewed at this time and again denied (1265a, 1266a, 1268a).

Since the defense knew that the Government had an eighteen-year-old arrest record from Wilkes-Barre, Pennsylvania which bore the defendant's fingerprints, a picture of the defendant, and the name "Frank Coppola," the defendant elected not to take the stand. After the defense had concluded its case, however, and during the Government's rebuttal, the

arrest record was offered by the Government and received as a full exhibit. Thus was the defendant cheated out of the benefit of his privilege against self-incrimination, and overwhelmingly prejudiced by a remote and quite irrelevant arrest record. To cap the error, there was absolutely no evidentiary foundation for the arrest record — not a scintilla of evidence as to how the name "Frank Coppola" got on the card or how it might have gotten there, nor where the card had been for eighteen years.

The treatment these issues received by the court below raises grave implications for future criminal cases and charts a clear course for unscrupulous prosecutors. The court first holds that although the indictment which went to the jury room referred five times to the defendant as "Frank James Coppola," the "transposition" of the names was corrected by the trial court when, in its introductory remarks to the *array*, the court said, "The Court has been informed that the defendant's name is James Miller, alias Frank James Coppola." Yet the array was not told by the judge that *the Government* had so informed it and, indeed, the record fails to show that the Government *ever* conceded that there had been a transposition. Moreover, after making the nearly meaningless statement quoted above, the court then read the indictment to the jury, five times calling the defendant "Frank James Coppola," then finished up by saying, "Now I referred here to the defendant as both Frank James Coppola, which is how he is described in the indictment, and to James Miller, alleged to have an alias of Frank James Coppola." This did nothing but add to the prejudice.

The court below also said that the defendant "was referred to as James Miller throughout the trial and in the charge." Yet the trial judge in the charge thrice referred to defendant as

"Coppola," and the prosecution in summation said, "Caron told us he was known as Frank. That was the code name he chose to use. Was he known as Frank? . . . it turned out that James Miller indeed, by his photograph and by his name, is not just James Miller but indeed, he is Frank Coppola" (Tr. 3432). "He goes down to New York and, of course, not as Frank Coppola — you don't sign a register under a name that you have been using in smuggle narcotics" (Tr. 3438).

Treating the indictment as if Miller had been the name and Coppola the alias, the court below held that it was proper to allege an alias. Yet, in the face of Judge Learned Hand's condemnation of aliases in *United States vs. Grayson*, 166 F. 2d. 863, 867, the only justification which the court could muster for an alias in this case was that "without the alias the Government would have been confronted with the point that while the indictment charged 'James Miller,' the proof other than identity related only to "Frank'." This observation, however, merely points out the evil of alias allegations, for the Government in this case *should* have been confronted with the dilemma from which the court seeks to protect it. The fact that the man in Bridgeport was known as "Frank" or "Frankie" and the defendant was not known by such a name was evidence of the defendant's innocence. What the court really held, therefore, is that an indictment may take the place of proof of identity.

Virtually every court which has considered the use of aliases in recent years has condemned the practice. See 87 ALR 2d 1217 (1963). This Court has not considered the matter, however, and the practice persists. Its only justification is to suggest that the defendant has a criminal record. If the defendant, as here, declares his true name, there is no legitimate reason whatever for an alias allegation. In no case has the practice been more abused, nor its consequences been more prejudicial, than in the case below.

As for the arrest record, the court below conceded that "the card was remote" but made the baffling observation that the eighteen-year-old record "had its own significance in indicating that Miller had long been leading a double life." This, despite the total absence of any evidence that during the intervening eighteen-year period he had ever been known by anyone as Frank, was the reason for admitting the record!

Defendant's observation that there had been no competent evidence that the defendant had put the name "Frank Coppola" on the card and that it was therefore hearsay, was met with the strange contention that the card was a business record. Yet the card was plainly not part of the F.B.I. files, and there was no evidence of where the card had been made, who made it, using what procedures, nor where it had been for eighteen years. The court therefore abolished the hearsay rule — at least if the hearsay purports to be a criminal record.

Finally, the court below uttered the incomprehensible *ipse dixit* that defendant was not prejudiced by the failure of the Government to offer the card in its case-in-chief. Yet had the card been offered and reveived at that time, the defendant would have taken the stand and would have offered the testimony of a psychiatrist who conducted narcoanlysis of the defendant. By holding off until the defendant's case was over, the defendant was tricked out of offering this vital evidence. The Government's tactics were not only unconscionable; they were unconstitutional.

The implications of the decision below need not be belabored. Hereafter, virtually any defendant may find himself indicted under a name other than his own and, if he has the temerity to claim that his own name is his name, may find that an arrest record two decades old is offered solely to support

the phony allegation in the indictment. The record may not even be his record, for the Government need offer no evidence that it is. The decision cannot and must not be permitted to stand.

III

IN CHARGING THE JURY THAT THEY COULD CONVICT THE DEFENDANT OF CONSPIRACY TO SMUGGLE NARCOTICS IF THEY FOUND THAT HE POSSESSED NARCOTICS AND HE FAILED TO EXPLAIN IT TO THEIR SATISFACTION, THE COURT INFRINGED DEFENDANT'S PRIVILIEGE AGAINST SELF-INCRIMINATON AND ALSO GAVE THE STATUTE AN INTERPRETATION WHICH RENDERS IT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The defendant, who was charged only with conspiracy to smuggle narcotics in violation of 21 *U.S.C.* §174, was convicted upon the following instruction:

> "... whenever on trial for a violation of this Section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury." (1489a).

This instruction was in contravention of the defendant's constitutional rights for two separate and distinct reasons:

1. In instructing the jury (in the words of the statute) that possession alone is enough to authorize conviction of con-

spiracy to smuggle narcotics from outside the United States, the court eliminated all distinctions between possession of narcotics and conspiracy to smuggle. If the law as given to the jury below were the law, then every individual who ever in his life had possessed L.S.D., peyote, or marijuana, could have been convicted on the indictment below. Manifestly, all that the statute may lawfully authorize is the inference that one in knowing possession of narcotics also knew that they were imported illegally. It does not and cannot supply the remaining elements of conspiracy, as even the Second Circuit itself has held. *United States v. Hernandez*, 290 F 2d 86. In this case, the court below ignored the issue, although it was clearly and squarely raised.

There is plainly no rational connection between mere possession of narcotics and the entire *mens rea* of conspiracy to smuggle. Cf. *United States v. Romano*, 382 U.S. 136. If the statute means what it says, it is unconstitutional. If it does not mean what it says, reading the statute to the jury is plain error.

2. In telling the jury that they could convict "unless the defendant explains the possession to the satisfaction of the jury" the court in this case commented adversely upon the failure of the defendant to take the stand as clearly as did the California court in *Griffin v. California*, 380 U.S. 609 (1965). Although the instruction held invalid in *Griffin* was wordier, it was essentially the same as the one given below. Moreover, the lack of wordiness in the instruction given below, which might be thought to make it less harmful than the one in *Griffin*, was more than compensated for by the fact that the court below spent four pages of its charge discussing the "presumption" under §174 and thus gave the presumption, and this portion of it, more emphasis than any other issue in the case. The adverse inference which would inevitably be drawn

by a jury which heard this instruction was exacerbated by the fact that although defendant had expressly requested that the jury be charged that no adverse inference could be drawn, a charge to which the defendant had an absolute right, *Bruno v. United States,* 308 U.S. 287, the trial judge failed to give this instruction until after the jury had deliberated for twenty minutes. Thus, even if a strongly emphasized no-inference instruction, given in the general charge, might somehow be thought to cancel out the quite contrary charge given in the language of §174, that was not this case. The only instruction which guided the jury's deliberations for the first twenty minutes below was that it could convict "unless the defendant explains . . . to the satisfaction of the jury." Since he had not explained at all, there was only one inference: guilt.

Moreover, when the no-inference instruction was given after twenty minutes' deliberation and without explanation for the delay, the instruction had quite the opposite effect from that which it might have had in the general charge. The jury was left free to infer that the twenty minutes had been spent fighting over whether the instruction would or would not be given, and thus the delay served only to emphasize the fact that the defendant had not testified.

Even without the exacerbating factor, however, the charge was patently an adverse comment and an infringement of constitutional rights. Even in *United States v. Gainey,* 380 U.S. 63, 70, where the Court held that a superficially similar instruction was not adverse comment "in the context of the instructions as a whole," such instructions were expressly disapproved, and *Gainey* was decided more than a year before the trial below. The instruction below was also far more prejudicial than that in *Gainey.* There, the jury was told that it could convict the defendant of possessing a still "unless the defendant

by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury." (Italics supplied.) The italicized portion of the instruction made clear that the explanation need not come from the mouth of the defendant; the instruction below did not. Moreover, the inference permissible in *Gainey* was from presence to possession; the inference authorized by the instruction here was from possession to conspiracy, a far longer leap. The jury was told that it could draw the adverse inference on the whole case.

IV

THE GOVERNMENT, IN IMPROPERLY DESTROYING AND WITHHOLDING EVIDENCE, DEPRIVED THE DEFENDANT OF A FAIR TRIAL.

a. The Government on October 10, 1963, took possession of the car which defendant allegedly received in Bridgeport three weeks earlier, on September 21, 1963. Although the Government witness Caron told the Government about the Bridgeport events at least as early as October 16, 1963, the defendant was not arrested until eight months later, June 19, 1964. Before the Government arrested the defendant it destroyed the evidentiary value of the automobile by putting it into daily use (100a). It was thus impossible for the defendant to usefully examine the car for fingerprints, hair and fiber residues, and other evidence which would support his claim that he had never been in or near the automobile in question. Had the Government preserved the car as evidence it would in all likelihood have revealed or helped reveal the identities of the persons who actually had been in the car three weeks before the car was impounded.

The defense raised this issue in motions to suppress evidence from the car, such motions being filed both in Texas and Connecticut. Requested evidentiary hearings were summarily denied.

In affirming the conviction, the court below opined that "[c]ommon sense tells us that the chance of finding useful fingerprint evidence nearly a year after the event was minimal and nothing in the record undercuts this conclusion." Yet, if the car had been carefully preserved, the facts are at variance with the courts' common sense, as the treatises which petitioner cited show.* Moreover, petitioner was never given the opportunity to put any evidence in the record regarding the longevity of fingerprint, fiber and hair evidence. The court below also avoided the point that the Government had the car three weeks after the event, at a time when it knew that someone would ultimately be accused of having received it in Bridgeport, and in failing either to make its own scientific investigation of the car or to preserve it for the defense, deprived an innocent accused of evidence which would have helped him prove his innocence. *Cf. Brady v. Maryland*, 373 U.S. 83, *Miller v. Pate*, 386 U.S. 1; *Giles v. Maryland*, 386 U.S. 66.

b. The Government hid the Caron children from the defense and strenuously resisted all efforts by the defense to talk to them. A pre-trial motion to take their depositions (84a) was denied. Several requests were made by the defense to interview the children during the course of the trial. In opposition, the (455a). When the court suggested that the children could be Government first asserted concern for the children's safety

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* Soderman and O'Connell, *Modern Criminal Investigations*, 130, 184-195 (1951); Bridges, *Practical Fingerprinting*, 224-225 (1942); Gross, *Criminal Investigations*, 150 (1962); Moreland, *An Outline of Scientific Criminology*, 128-129, 162-166 (1950).

produced for interview without endangering their safety (748a), it became their emotional health (758a). When some details were requested (786a) and found non-existent (850a), a third tack was taken: the "legal guardian" of the children had the absolute right to decide whether the children would be talked to (854a). This one the court bought. Not surprisingly, the "guardian," whose husband was then under cross examination by the defense, elected that the children would not talk (920a). And that was that.

There is no doubt that the court has power to order a prospective witness to submit to an interview during or prior to trial. The assumption of the Government and of the court that everyone has an absolute right to refuse to be talked to is erroneous. Moreover, it was plainly improper to regard Mrs. Caron as competent to exercise this imaginary right for her children. The Sixth Amendment right to compulsory process is meaningless if it permits the Government to hide witnesses from the defense and thus require the defense to call them to the stand without having the slightest inkling of what they might say. No competent lawyer will call a witness under such circumstances. To require him to do so is to deny him the witness.

The two children were present when Bridgeport Frank had coffee with Caron in the Green Comet Diner. Yet the court below decided that the error, if any, was harmless because "the jury would scarcely be impressed if the children (the oldest of whom was then ten) . . . had been unable to identify him three years later." Yet the jury might have been impressed if the children had stated that the man in question wore jewelry or clothing of unique kind, or that his nose was much larger than the defendant's or his skin a very different color. Moreover, had the defense been given an opportunity

to interview the children before trial, when their memories were fresh, it might have obtained clues or leads to other evidence which would help establish the defendant's innocence. The court's speculation that the children had nothing of value to offer is entirely unwarranted.

c. On cross-examination, Caron admitted having applied for a pardon but adamantly denied that he had been promised a pardon for testifying. In his charge to the jury, the court stated, in essence, that there was no evidence that Caron had been promised a pardon and that the claim should be disregarded.* In its brief on appeal below, the Government still denied that Caron had been promised a pardon. Yet three weeks after the trial, Caron's ten-year prison sentence was "commuted to expire at once" (letter from Department of Justice, Office of Pardon Attorney, May 22, 1967, printed in Appendix to petitioner's reply brief below). The facts regarding the promise of a pardon were withheld from the defense

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* The instruction was as follows:

"Now, if you find that the Government has purchased the testimony of Mr. or Mrs. Caron with gold or with liberty, with extra favor, either given or promised to him, you will acquit this accused. I mean such conduct would not only be reprehenible but it would be unconstitutional. So, if you find that to have been the case, you acquit the defendant.

"On the other hand, if you do not find that the Government purchased or agreed to pay the Carons for testifying against the defendant you will, of course, disregard the claim completely.

"There isn't any doubt that some in the Government organization have indicated a belief, or at least some judgment, that Mr. Caron deserves some consideration on an application for a pardon. Well, I don't know what all the nuances of that are and neither do you, I guess, except to what appear here.

"What appeared is that he, as a relatively minor cog in this operation, did tell the whole story. But this determination, whether or not he is entitled to any consideration which might fit in with those considerations that the pardon authority takes into account, is for the Pardon Board. Nobody in the Department of Justice, Criminal Division, has any authority whatsoever to release anybody who has been sentenced to a term of imprisonment by a Judge of the Federal Court. If there is any commutation or alleviation of that sentence it has to be done by the prison authorities through the Pardon Board."

despite repeated motions to obtain them, and despite court orders to produce them.

The defense requested the court before trial to order the tender of all applications, interviews, etc., of the Carons in custody of the Immigration and Naturalization Service (251a). These documents were never produced.

A request was made for statements made by or to Arnold Stone of the Department of Justice, including interviews of Caron, letters or reports to the Bureau of Prisons or the Attorney General (498a). It was represented that no such reports were in the prosecution's files (501a). Yet much later, after both Caron and Stone had testified, some items were delivered up (1255a) and some were sealed (1254a-1255a).

Caron admitted writing a letter to Attorney General Katzenbach regarding a pardon (663a) and to having applied to the Pardoning Attorney for executive clemency (514a). The Government admitted that such letters existed (842a), but they were never tendered.

The above statements were Jencks Act, 18 U.S.C. §3500, statements and would clearly have revealed the truth regarding Caron's expectations and promises of a pardon and other considerations. Withholding such documents was, especially in view of the court's illegal and prejudicial charge on the pardon issue, patently unfair.

V

THE ENTIRE PROSECUTION WAS A FARCE ON JUSTICE, FUNDAMENTALLY UNFAIR, AND PRODUCED THE CONVICTION OF AN INNOCENT MAN.

The tactics used by the Government to obtain an identification of the defendant could not have been better calculated

to produce a mistaken identification. Taking an ignorant, entirely unscrupulous criminal who barely speaks English, holding over his head criminal charges for which he could spend the rest of his life in prison, and offering the alternative of immunity for himself and his wife for numerous crimes in Canada and the United States, Unites States citizenship, support and care for his wife and children, a job for himself and his wife, and a pardon for the one offense for which he was convicted, the Government let him sit in a Texas jail for five months — October 10, 1963, until February 12, 1964 — before it took him to observe the defendant. In the meantime, the witness's identification of one Frank Mancuso as the man in question was somehow determined to be unsatisfactory and more pictures were shown. More and more pictures of the defendant were shown until Caron was ripe for identifying the defendant. Then, with his sentencing still pending, he was taken to Connecticut. Even then, surprisingly, he did not at first identify the defendant; so he was taken back the second day for another look. Then he made the identification. His wife, on the other hand, consistently failed to identify the defendant from pictures right up through the Texas trial of the Canadians, almost two years after the Bridgeport events (984a, 988a, 989a). Although she had earlier testified that she hadn't gotten a good look at he man in Bridgeport, she made a positive identification, finally, at the trial.

After getting its identification, the Government waits until June, 1964, to arrest the defendant, in the meantime keeping close surveillance on him, including tapping his telephones and those of his attorneys (a fact which we have not yet been able to prove but which the Government has not yet, in writing, denied, although asked to do so in the Court of Appeals). In the meantime, the Government seizes the records of the Bridgeport Motor Inn (which it manages to withhold from the de-

fense for two years, after which they are, of course, worthless as a means of trying to find witnesses to the crime), destroys the evidentiary value of the Caron Chevrolet. It is then ready to make its arrest, and it does so in high style, alerting the press and T.V., who are on hand to watch the posse of policemen swoop down on the defendant and raid his beauty parlor. The press is told by the Government that it has broken the largest narcotics ring in history and that the defendant, whose real name is Frank James Coppola, is the number one American figure in the syndicate (104a-109a, 114a-120a, 225a-245a).

Instead of indicting the defendant in Connecticut, the Government indicts him in Texas, and forces him to try to defend himself more than 2300 miles from his home and the place of the crime. A veritable blizzard of motions is filed in Texas asking relief from the press coverage, the technical surveillance, the harassment of witnesses, the destruction of evidence, the suppression of evidence, and virtually all are summarily denied without evidentiary hearing. When the case is finally transferred back to Connecticut, the motions are renewed, and again summarily denied. It is not until April 19, 1966, two and one-half years after the crime and eleven days before trial, that defendant is even furnished with a bill of particulars.

At the trial, the Government fails to produce witnesses which it promised to produce, and keeps others in hiding. Numerous documents relevant to the defense and producible under the Jencks Act, 18 U.S.C. §3500, are not disclosed. Inflammatory and prejudicial evidence is admitted, and the court delivers, in the guise of a charge, a second summation for the prosecution.

As a result, a man who did not meet the description of Bridgeport Frank, a man who, according to the testimony of

customers and employees of his beauty shop, corroborated by business records, was at work, fifteen miles away, when the crimes occurred, was convicted of a heinous offense on eyewitness testimony which Glanville Williams says is "practically worthless." Williams, *The Proof of Guilt*, 119-120 (3d ed. 1963).

This case is unfortunately an excellent illustration of the techniques by which prosecutors and courts, hostile to this Court's efforts to civilize the administration of criminal justice, can undercut those decisions by subtly eroding the traditional procedural rights which have largely, as yet, escaped this Court's attention. Unless the Court supervises the entire criminal process, criminal defendants will be far worse off than they were before *Miranda v. United States*, 384 U.S. 436, and other decisions seeking to compel Governments to be fair when they bring their might to bear against an individual.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STEVEN B. DUKE
W. PAUL FLYNN
RICHARD H. SIMONS
Counsel for Petitioner

APPENDIX A

21 *United States Code, Section* 174 *Importation of Narcotic Drugs Prohibited; Penalty; Evidence*

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States . . . contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned . . .

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 471—September Term, 1966.

(Argued June 6, 1967 Decided July 26, 1967.)

Docket No. 30989

UNITED STATES OF AMERICA,

Appellee,

—v.—

JAMES MILLER, a/k/a FRANK JAMES COPPOLA,

Appellant.

Before:

MOORE, FRIENDLY and FEINBERG,

Circuit Judges.

Appeal from a judgment of the District Court for Connecticut, M. Joseph Blumenfeld, *Judge,* convicting appellant, after a verdict, of conspiring to import heroin in violation of 21 U. S. C. §§173-74. Affirmed.

W. PAUL FLYNN (Kopkind & Flynn, New Haven, Connecticut) (Richard H. Simons, Milford, Conn., Steven B. Duke, New Haven, Conn., on brief), *for Appellant.*

JON O. NEWMAN, United States Attorney, Hartford, Conn. (William B. Butler, Special Attorney, Department of Justice, Ass't U. S. Attorney, Southern District of Texas), *for Appellee.*

FRIENDLY, *Circuit Judge*:

James Miller, a resident of Milford, Connecticut, was found by a jury in the District Court for Connecticut to have conspired to import heroin into the United States in violation of 21 U. S. C. §§173-74. The seriousness of the crime is attested by Judge Blumenfeld's sentence of 12 years imprisonment on a first narcotics conviction.

The indictment naming seven defendants was returned in the District Court for the Southern District of Texas on May 27, 1964. Judge Connally in that court granted Miller's motion for a severance on August 17, 1965, and, after initial denial by him of a motion for transfer of Miller's case to Connecticut pursuant to F. R. Cr. P. 21 and refusal of mandamus by the court of appeals, *Miller* v. *Connally,* 354 F. 2d 206 (5 Cir. 1965), directed such transfer on February 18, 1966. The four other defendants who were arrested, Lucian Rivard, Charles Emile Groleau, Julien Gagnon (who went under the name of Jerry Massey) and Joseph Raymond Jones, have been convicted in Texas and their convictions affirmed. *Rivard* v. *United States,* 375 F. 2d 882 (5 Cir. 1967).

The appeal, rather unusual these days in that Miller claims he was innocent of the crime charged, raises what the Government has identified as twenty-five separate points; very likely there are even more. A summary of the evidence is essential to put them in proper focus.

I.

The Government's case, presented in the main through one Joseph Michel Caron, established a large-scale conspiracy to smuggle heroin into the United States in which a resident of the Bridgeport, Conn., area described by the participants as Frank or Frankie was an important cog. The tale begins with meetings between Caron, Massey, Jones and Rivard in and near Montreal in May and June 1963. Caron and Jones were initially to purchase new cars; Massey and then Jones went to Europe for supplies. In August Groleau instructed Caron that Massey was returning to Montreal by ship "with a load of white powder," and that Caron should case the pier for the presence of police and then meet Massey. The latter's car was unloaded from the ship, and the two drove to a nearby tavern at St. Austache; en route Caron saw Rivard following in another car. Massey and Rivard entered the tavern while Caron guarded the car; Massey soon left the tavern, parked the car and told Caron it had 68 pounds of white powder which would be unloaded; still later Massey said that Caron was to take the load to some place in the United States. After a week or two, Caron was instructed that a Howard Johnson restaurant in Flint, Michigan, was to be the place; he received $700 as a fee and $88 for use of his car, a 1962 Chevrolet. The Flint expedition was cancelled at the last moment, and Caron and his wife took a pleasure trip to New York City instead. After an interval, Rivard and Massey gave a new designation, the Bridgeport Motor Inn. Massey loaded the Chevrolet with dope, and Caron and wife drove off for Bridgeport, phoning Rivard after crossing the border as instructed. On arrival at the Motor Inn, Caron registered as Mr. Robert and left the car with one door unlocked, his keys and registration in the ashtray,

and a paper with his room number on the windshield. Shortly thereafter a man whom he identified as Miller came to his room with the keys and registration, said he could not take the car that day, and instructed Caron to put it in the parking lot and await orders. On the next day Miller phoned that he would be unable to unload then but that Caron should leave the car in the motel parking lot and await further instructions. The following morning he telephoned that would be the day.[1] Caron then unlocked one car door and left the keys and registration in the ashtray as before; around noon he noticed the Chevrolet was gone. Miller returned it during the afternoon and Caron perceived that a large bump in the back rest of the front seat had disappeared.[2] On Caron's return to Montreal, Rivard asked, "How is Frankie my friend?" Caron, who had not previously known the Bridgeport man's name, confirmed his good health and added that he had beautiful hair; Rivard responded that he was a hairdresser. In fact Miller was the proprietor of a chain of beauty shops.

In September Groleau instructed Caron to render the returning Jones the same services at the Montreal pier that he had performed for Massey. A contretemps occurred when Jones' car caught fire while being driven to a rendezvous with other conspirators. Jones confided that it contained 84 pounds of white powder he had obtained in France, and that Groleau had paid him $1700 for his efforts. Later Rivard told Caron he was to take Jones' load to the Bridgeport Motor Inn, after which he was to undertake

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1 He apologized for calling late, saying he had been up late the night before; Miller's uncle by marriage confirmed he had been with Miller until 1 A.M. that night.

2 On returning the car, Miller gave Caron $50 to defray the costs of the latter's three-day stay at the motel. Registration cards showed the dates of this trip to have been August 20-23.

journeys to France or Mexico City. Caron parked his car on a Montreal street and someone picked it up to transfer Jones' load. Later Rivard supplied him with funds and said he would "get in touch with the man in there, with Frank" and tell him "to make it fast" on this occasion and not consume three days as he had before. Caron was to follow the same procedure as on the first trip and was encouraged to take three children as well as his wife; Rivard thought "it looks better when you cross the border with your kids." Caron crossed the border around nine o'clock, phoned Rivard as instructed, spent the night in Albany, and reached the Motor Inn around noon on September 20. While the family was eating lunch at a nearby restaurant, Mrs. Caron noticed a man around the car. Caron went out, found Miller and another man, and gave Miller the keys and the registration. Later Miller entered the restaurant, where Caron had resumed his meal and had Caron join him for a cup of coffee. Miller advised that it would be too risky for Caron to come back—"two times is enough times"—and that he should tell Rivard to send him to Flint "next time." Caron, with Miller accompanying, drove his Chevrolet about a thousand feet; the other man followed in a second car. Then Miller told Caron to alight and go back to the Motor Inn; the Chevrolet was returned later in the day and the Caron family departed for Montreal the following morning.

The final act begins with a meeting between Caron and Rivard to settle some financial matters at the "domaine ideale," a summer resort near Montreal owned by the latter. Rivard asked whether Caron wanted to go to Mexico City and, on receiving an affirmative answer, said he would get in touch. The order soon came; Caron was to go to the El Diplomatico Hotel on arrival in Mexico City, phone a

man named Jorge, and utter a password. Rivard instructed on the technique of loading dope in the back rest and gave Caron the tools for surgery on the upholstery. Armed with these and $1200 expense money Caron and wife drove off. After the arrival in Mexico City there were many complications and telephone calls to Rivard to unravel them. Finally the Chevrolet was loaded by the local branch of the conspiracy and, on Rivard's instructions, Caron was given a piece of paper bearing the words "Stradford Motor Inn, Connecticut Exit 32,"[3] along with instructions as to where and when to cross the border and to call Rivard to report success.

This time the plan miscarried. Caron's car was stopped on entering Texas at Laredo at 8 A.M. on October 10, and 76 pounds of heroin were removed from the back seat and panels. Between 2 and 6 A.M. on the morning of October 11 Miller and another man checked into the Luxor Baths on 46th St. in New York City, where Miller registered under the name of James Martin of Providence, R. I. The significance of the journey and of the use of an assumed name was heightened by Caron's testimony, developed on cross-examination, that Rivard had told him Frank "hung out" in New York City between 44th and 48th Streets.

Mrs. Caron corroborated her husband's testimony and identified Miller as the man she had seen on two occasions in Bridgeport. Many details, including Caron's phone calls to Rivard, were substantiated by independent evidence. Miller did not testify. The defense was an alibi, namely, that Miller was in his beauty salon at the times Caron placed him at the Motor Inn. Customers testified they

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3 This is less than four miles from Exit 36 of the New England Thruway leading to Milford, where Miller's principal place of business was located.

were at the salon at the times indicated for their appointments but most of them were not under Miller's own care. Employees testified Miller never left the salon during the weeks of Caron's trips to Bridgeport. However, Miller's uncle by marriage, see fn. 1, contradicted this, saying that in August and September, 1963, Miller was out of the beauty parlor once and sometimes twice daily to supervise construction of another salon in a town 20 minutes away. This also was the time required to drive, at posted speed limits, to the Bridgeport Motor Inn.

II.

We have stated the evidence at this much length because the mere recital very nearly suffices to answer many of appellant's arguments. The claim that the Government proved only two isolated transactions against Miller and thus failed to show his membership in the conspiracy under the rule of *United States* v. *Koch*, 113 F. 2d 982 (2 Cir. 1940) and similar cases is frivolous. It ignores such important facts as the large quantities involved, Miller's own statements about Rivard and Flint, Rivard's inquiry concerning "Frank," and the clear evidence of prearrangements. Experienced counsel should not burden the court by repeating the statement, discredited both in logic and in law, see *United States* v. *Nuccio*, 373 F. 2d 168, 173 (2 Cir.), cert. denied, —— U. S. —— (1967), and cases cited, that it is the defendant's "words and acts alone which reveal whether he joined a conspiracy." How counsel can seriously urge "the absence of evidence that narcotics were delivered to the defendant or that defendant knew he was receiving narcotics" since "the evidence connecting defendant to a conspiracy is as consistent with a conspiracy to deal in diamonds, gold, geodetic maps, stolen securities or any

other contraband as it is with a conspiracy to traffic in narcotics," passes understanding. Frivolous also is the claim that venue as to Miller was improperly laid in the Southern District of Texas since the "Mexican" conspiracy was allegedly separate and apart from any that Miller was proved to have joined. There was ample evidence that Mexico was an alternate source of supply for the large scale operation in which Bridgeport Frank was an important participant; indeed, it is fairly inferable that the shipment of heroin intercepted at Laredo was destined for him. We turn therefore to the claims that Miller was prejudiced by matters occurring before and during the trial and by errors in the charge.

III.

The first claim is that a fair trial was prevented by the prejudicial publicity given to Miller's arrest on June 19, 1964. This occurred about noon, at his beauty shop in Milford, simultaneously with the arrest of his four co-conspirators in Montreal. The arrests were publicized in the New York Daily News of Saturday, June 20, under the colorful headline "NAB 2 TYCOONS, BUST WORLD DOPE RING No. 1" and in the Bridgeport Sunday Herald of June 21 under the equally loud banner "RAIDERS CHARGE: MILFORDITE FED DOPE TO N.Y. UNDERWORLD." Both articles evidenced extensive communication from the Government. The Daily News article described appellant as "Frank James Coppola, a 37-year old ex-convict who masqueraded as a legitimate businessman in the swank Connecticut suburbs where he lived and worked" under "the legally changed name of James Joseph Miller"; in fact the proof at the trial showed that Miller was appellant's name and Frank Coppola an alias as we shall see. The News quoted "the authorities" as saying that heroin "was funneled" through Coppola to

New York, Chicago and other major cities throughout the United States, a charge made in the indictment only in much more general terms and not proved at the trial save for the evidence as to Miller's occasional trips to New York. The Bridgeport Herald article said that "a Milford beauty parlor operator has been described by Federal authorities as the key cog for the New York underworld in an international narcotics ring which operated across the Mexican and Canadian borders"; the indictment had not specifically charged Miller with being "the key cog" and the proof later offered hardly supported so extreme a statement. The article said that "Frank J. Coppola, alias James Miller, is listed in a Federal indictment handed down May 27 as the operator of a 'pick up' point for a multi-million dollar smuggling ring in Milford and as a major distributing agent for heroin brought into Connecticut.'" The article erred both in repeating the indictment's incorrect transposition of Miller's true name and the alias and in quoting words not actually contained in the indictment. The article also said that "a good portion" of the narcotics seized at Laredo "was earmarked for the Milford drop for a New York pickup," and that "while none of the bulk heroin left with Coppola was handled by pushers in Connecticut, authorities said it undoubtedly seeped back to state 'contacts' via New York underworld sources."

We have previously indicated our disapproval of the Government's stimulating the type of publicity concerning important federal arrests in Connecticut which appears to have been somewhat in vogue during 1964. *United States* v. *Costello*, 352 F. 2d 848, 852 (1965), cert. granted on another point, 383 U. S. 942 (1966), see also 385 U. S. 1000 (1967); *United States* v. *Grassia*, 354 F. 2d 27, 29 (1965). Attorney General Katzenbach took an effective

step to prevent such abuse in the Statement of Policy issued on April 17, 1965, 28 C. F. R. §50.2, and we commend the code on this subject for police and law enforcement agencies recommended by The Special Committee on Radio, Television and the Administration of Justice of the Association of the Bar of the City of New York chaired by our colleague, Judge Harold R. Medina, Freedom of the Press and Fair Trial 32-35 (1967). See also American Bar Association Project on Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press 5-8 (Tent. Draft 1966). However, the stories here in question appeared in New York and Bridgeport papers in June 1964, whereas the trial was in Hartford in May and June 1966. When questioned, only five veniremen said they had read of the case, and their references were not to the cited articles but to announcements that the trial was starting. Appellant's point that these answers lacked some of the significance claimed by the Government since they were in response to the judge's asking about "the last time" the prospective jurors had heard or read about the case is blunted by the fact that the court did not stop there but conducted a thorough voir dire into the veniremen's preconceptions concerning the defendant's guilt, to which none responded affirmatively; and the defense failed to request a more searching inquiry. Neither can we accept Miller's contention that a Hartford jury was necessarily prejudiced by single New York and Bridgeport reports of two years before, see generally Comment, "Free Press-Fair Trial" Revisited: Defendant-Centered Remedies as a Publicity Policy, 33 U. Chi. L. Rev. 512, 523-26 & n. 73 (1966); as we observed in *United States* v. *Grassia, supra,* 354 F. 2d at 29, "Criminal defendants are understandably prone to exaggerate the interest their fellow citizens take in matters

of such acute concern to them." Miller expressed no desire for a further postponement or preference for any place of trial other than Hartford and the statements were a long way from the level that might prevent trial at any time or place. Although appellant asserts also that the newspaper accounts of the crime impaired his ability to obtain witnesses to assist in his defense, we cannot believe that the excess of the articles over what would have been a proper report of the indictment and arrest, which is all that Miller can legitimately complain about, could have had this effect, or were sufficiently likely to have had it to entitle him to a hearing on that issue.

The next contention is that the Government's failure promptly to make Caron's Chevrolet available for investigation and its placing the car in government service deprived Miller of evidence essential for his defense. The specific claim is that examination of the car shortly after Miller's arrest on June 19, 1964 might have revealed the absence of his fingerprints or the presence of those of some other denizen of Bridgeport nine months before, or have negated the carriage of heroin in the back rest of the front seat.[4] Miller's counsel first sought, by a letter addressed to an Assistant United States Attorney in Houston, to inspect the car on September 9, 1964; the record does not inform us what happened thereafter save that a motion for inspection was first made in July 1965 and was promptly granted.

Common sense tells us that the chance of finding useful fingerprint evidence nearly a year after the event was minimal and nothing in the record undercuts this conclusion. Nor is there any evidence that if an examination of

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4 The shipment loaded in Mexico City was under the rear seat and in the panels, the Mexico loaders having failed to comply with Caron's instructions to load the car as before.

the back of the front seat to negate carriage of heroin in August and September 1963 would have been fruitful in September 1964, it would not have been in August 1965, and Caron's testimony as to cuts in the upholstery presumably could have been checked at that time. Moreover, while Caron's transportation of heroin to Bridgeport was an issue in the sense that in a criminal trial everything is, the proof on that subject was exceedingly strong and the only issue really contested was whether Miller was Bridgeport Frank. Realization of all this may have accounted for counsel's waiting ten months between his request of the United States Attorney to inspect the car and his motion in court for that relief. We thus find nothing to indicate that the Government deprived Miller of evidence relevant to his defense.

IV.

Extended argument is made as to the indictment's naming appellant as "Frank James Coppola alias James Miller" and a related incident at the trial. While his case was still in Texas, Miller moved that the words "Frank James Coppola alias" be removed from the indictment; he offered birth, marriage, military and other records to show that his name had always been James Miller or James Joseph Miller. The motion was denied both in Texas and, on renewal, in Connecticut. However, at the start of the trial the court read to the jury array the style of the case, comprised of the names of all seven alleged conspirators including "Frank James Coppola alias James Miller," and pointed out, "The only defendant who will be tried here today in this case is the defendant James Miller. The Court has been informed that the defendant's name is James Miller alias Frank James Coppola." Furthermore,

appellant was referred to as James Miller throughout the trial and in the charge, and although the Government made point of the alias in its summation it did not argue that Coppola was defendant's true name and Miller a mere alias. While Caron's testimony showed that the Bridgeport member of the conspiracy was known to his fellows as "Frank" or "Frankie," it did not include a surname. In defendant's case much was made of the fact that since early childhood he was always known as James Miller. To contradict this the Government in rebuttal offered a fingerprint card from the files of the F. B. I. The card bore the typewritten name and signature of Frank Coppola, the photograph was that of Miller, and an expert identified the fingerprints as his.[5] The card was made out in Wilkes-Barre, Pa., where appellant, then 24 years old, was arrested in 1948 for petty larceny; the Government offered to mask the portion of the card indicating the arrest but defense counsel declined and objected to the offer *in toto*. The judge admitted the card, instructing the jury to disregard any information on it other than that relating to identity.

While it would have been better physically to correct the indictment to transpose the reference to Miller and Coppola, the judge's instruction to the jury array took sufficient care of that matter. Appellant cites *United States* v. *Monroe*, 164 F. 2d 471, 476-77 (2 Cir. 1947), cert. denied, 333 U. S. 828 (1948), and *United States* v. *Grayson*, 166 F. 2d 863, 867 (2 Cir. 1948), as condemning the use of aliases in indictments. But the disapproval expressed in those opinions is limited to cases where the alias is without relevance; indeed, Judge L. Hand in *Grayson* emphasized that there, "No issue could come up as to Grayson's identity, and an alias—even a single alias—can serve no pur-

5 No evidence as to identity of handwriting was offered.

pose." In this case without the alias the Government would have been confronted with the point that while the indictment charged James Miller, the proof other than the identification related only to "Frank." See *United States* v. *Valenti*, 74 F. Supp. 718 (W. D. Pa. 1947); *United States* v. *Melekh*, 193 F. Supp. 586, 595 (N. D. Ill. 1961). Furthermore, it is significant that in *Monroe*, which presented a context not dissimilar to the one here, the conviction was affirmed; and Judge Hand in *Grayson* said that the use of the alias, even when considered together with another minor error at trial, "would not in our judgment even remotely tend to justify a reversal."

As to the fingerprint card, the Government was entitled to offer it in its direct case, and we perceive no prejudice to appellant from its having withheld the card until his own presentation gave added emphasis to the question of name. While appellant loudly asserts that the card was inadmissible hearsay, he fails to explain why it was not receivable as a record kept in the regular course of business, 28 U. S. C. §1732(a). The judge was warranted in thinking the probative value of the evidence far outweighed whatever prejudice may have come from disclosure of an arrest for a minor crime in 1948—a disclosure which the Government offered to prevent although defense counsel's refusal of the offer is understandable. While in one sense the card was remote, its proof that appellant had been using the name Frank Coppola so many years ago, indeed shortly after leaving the Navy, had its own significance in indicating that Miller had long been leading a double life.

V.

The next point deserving comment is the criticism of the Government's being permitted to supply proof of the details

as to how after his arrest Caron had identified Miller as the man he had seen on both visits to Bridgeport. The opening statement of Miller's trial counsel made it clear that identification was the central issue in the case; he asserted that federal officials were "looking for a person in the Bridgeport area," that to that end they "enlisted the services of one Sergeant Maroney of the Connecticut State Police" who had a personal grudge against Miller, and that the Government had "purchased" from the Carons, with more than $5000 in cash spent for the upkeep of Mrs. Caron and the children and ten to twenty years in freedom from prison sentences, testimony that it knew to be fabricated and "tailored to fit the individual produced by Sergeant Maroney." Caron underwent a five-day cross-examination which developed his lengthy criminal record, the fact that no charge whatever had been placed against his wife and none against him for the Bridgeport crimes, and his hope for pardon or commutation of sentence on the charge of smuggling heroin from Mexico to which he had pleaded guilty and been sentenced in 1964. It developed also that shortly after his arrest he had given customs agents a description of Frank and the other man seen in Bridgeport; that later he had been shown some photographs including Miller's; that, while saying these looked like Frank, he had been unwilling to make a positive identification from photographs alone; and that he was then taken to Milford, was not completely sure of his identification on his first sight of Miller who was too far away, but became certain on seeing him again the next day.

The Government then called various witnesses to describe just how the identification had been made. Richards testified that on October 16, 1963, Caron gave a detailed description of the man with whom he had had dealings in Bridgeport; the judge instructed that this was to be con-

sidered solely as showing how the investigation had begun and not as affirmative proof identifying Miller. Richards continued that later eight to ten photographs of other persons and three of Miller in different poses were shown Caron who picked out the photograph of Miller saying, "This looks like him, but I can't be sure. I would like to see him in person." Cross-examination brought out that Caron had also been "fairly sure" that photos of another man were of Frank but with the reservation that the subject was "somewhat heavy to be Frank." The Government next called Fallon, a customs agent from the New York office whose territory included Milford, Conn. He testified he had received the description given by Caron and sent photographs of Miller, these being the only ones he had requested by name. He also corroborated Caron's testimony as to the identification in Milford in February, 1964, as did William J. Demlong, a Connecticut state policeman. Defense counsel cross-examined Fallon concerning Sergeant Maroney, explaining to the court in presence of the jury, in response to an objection of irrelevancy, "It's relevant to my opening statement, that John Maroney is the person responsible for this man being picked out." Fallon testified that he had not met Sergeant Maroney until November 19, 1963, some weeks after Caron's identification of Miller's photographs. Murphy, another customs agent, testified to taking a photograph of Miller on November 1, 1963, apparently as a result of a request for a full-length photo to resolve Caron's doubts as to whether the photograph of one other than Miller represented Frank. Finally Frederick A. Rody, Jr., special assistant to the Commissioner of Customs, negated a suggestion made in the cross-examination of Fallon that Caron had identified the photograph of still a third man as Miller.

Even if Caron had not been impeached, the Government was not forced to rely on his identification of Miller in open court but could have brought out the details of his positive identification in Milford by his own testimony and also by that of others corroborating his version of the details. See *United States* v. *Forzano*, 190 F. 2d 687 (2 Cir. 1951); *Bolling* v. *United States*, 18 F. 2d 863 (4 Cir. 1927); *Eidson* v. *United States*, 272 F. 2d 684 (10 Cir. 1959).[6] Compare *United States* v. *Wade*, —— U. S. ——, —— (1967); *Gilbert* v. *California*, —— U. S. ——, —— (1967). We need not consider how far this same principle permitted proof of earlier observations of photographs, see *United States* v. *Reed*, 376 F. 2d 226 (7 Cir. 1967); that subject was opened by the defense's cross-examination of Caron, and the Government "was not bound to let the defendant bring out only what he pleased and be content itself with no more." *Vause* v. *United States*, 53 F. 2d 346, 352 (2 Cir.), cert. denied, 284 U. S. 661 (1931); see also *Cohen* v. *United States*, 157 Fed. 651, 656 (2 Cir.), cert. denied, 207 U. S. 596 (1907); *United States* v. *Pugliese*, 153 F. 2d 497 (2 Cir. 1945). The sole item subject to criticism was the Government's developing from Fallon that the only photograph he had requested by name as meeting Caron's description was Miller's. Since, as appellant argues, the jury might have taken this to mean more than it said, namely that after reading Caron's description Fallon was of the opinion that Miller was the guilty party, the Government ought not to have asked that question. However, defense counsel objected only on the score of hearsay.

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6 See 4 Wigmore, Evidence §1130 (1940 ed.): "This is a simple dictate of common sense, and was never doubted in orthodox practice. That some modern Courts are on record for rejecting such evidence is a telling illustration of the power of a technical rule of thumb to paralyze the judicial nerves of natural reasoning."

Since the valid objection was rather that Fallon's opinion was incompetent, the judge was warranted in resting on the general instruction given when the line of testimony began; moreover, it was scarcely a surprise to the jury that the Government had been suspicious of Miller from the outset.[7]

VI.

When the trial was in its fourth week, the deputy clerk advised the judge that someone had talked to a juror about the case at a social gathering. The judge immediately brought the matter to the attention of counsel; defense counsel requested him to make inquiry without counsel being present and suggested that this be deferred for a short time until the taking of evidence was concluded and that the juror be cautioned in the meanwhile not to discuss the matter. When the judge spoke to the juror, it was discovered that he had already mentioned the incident to two others, like him residents of Litchfield, Conn., with whom he drove to court; the judge instructed him not to discuss it further and to give similar instructions to the two other jurors.

After the taking of evidence had ended, the judge called the three jurors into his chambers. The juror reported that a man serving drinks at a cocktail party had said,

7. Still on the subject of identification, much is made of the defense's inability to interview the two oldest Caron children, the court having taken the position that this was for their legal guardian to decide but having also made clear that compulsory process for their testimony would issue upon request. While the Government is doubtless bound not to obstruct a defendant's access to a prospective witness, we know of no rule requiring the witness to submit to an interview. Moreover the jury would scarcely have been impressed if the children (the oldest of whom was then ten), who had seen "Frank" only for a moment while eating lunch, had been unable to identify him three years later.

"I'm just going to warn you that another man in Litchfield told me that when this is over, that unless you're very careful that there is a bunch in Torrington who are going to get after you and beat you up. They don't want to kill you, but they don't like what is going on." After pointing out that such a remark might have been intended either to intimidate a juror or to cause him to stiffen up, the judge inquired whether it would affect the decision of any of the three. All answered in the negative and assured the judge that no other jurors knew of the incident. The juror to whom the remark had been made then said he thought one of the others "should mention something about that place over there." This juror said there were two places in Torrington where his grandsons reported dope was being sold. He added "that doesn't affect me any, only to the extent I have grandsons, and so forth," the suggestion apparently being that the judge should bring the matter to the attention of the authorities in order to stop further sales. On further questioning this juror affirmed, "It has nothing to do with me. I will say it the way I see it." On returning to court the judge denied a defense motion for a mistrial.

While the incident was unfortunate, as was that in *United States* v. *Borelli*, 336 F. 2d 376, 392 (2 Cir. 1964), cert. denied, 379 U. S. 960 (1965), and the communication was more troublesome than the ringing of the juror's telephone in *United States* v. *Gersh*, 328 F. 2d 460, 462-63 (2 Cir.), cert. denied, 377 U. S. 992 (1964), there was nothing like the probability of prejudice present in *Remmer* v. *United States*, 350 U. S. 377 (1956). The juror in that case conceded he had "been under a terrific pressure" from the combination of an offer of a bribe and an interview by the F. B. I. which "whatever the Government may have understood its purpose to be" had not "dispersed the cloud"

created by the offer. 350 U. S. at 381. Here there is no basis for doubting the ability of the three jurors to exercise the fair judgment they promised. The only way in which the judge might have handled the matter better would have been by interviewing the jurors individually as he had indicated he would, since this would have somewhat reduced the risk of a juror's being unwilling to admit susceptibility to extraneous influence. However, we cannot regard the joint interview as a misuse of the wide discretion accorded him. While the written motion for a new trial complained that the opportunity to cross-examine the three jurors was not granted or afforded defense counsel, that had been expressly waived in favor of inquiry by the judge. At the argument on the motion defense counsel referred to his attempts to interview the jurors, their consulting an attorney, and a suggestion by someone, presumably the attorney, that any interviews be held in abeyance pending an order from the judge; he sought a two week adjournment to permit such interviews. The judge declined to grant this and denied the motion for a new trial. We find no error in this. The case is entirely different from *Remmer* v. *United States*, 347 U. S. 227 (1954), where the trial court apparently did not even interview the juror in question and the record did not show "what actually transpired"; as the later opinion made clear, 350 U. S. at 379-80, "It was the paucity of information relating to the entire situation coupled with the presumption which attaches to the kind of facts alleged" that "made manifest the need for a full hearing." Here the judge had developed the facts by interrogating the jurors, with counsel agreeing not to be present; there was thus no occasion for subjecting the jurors to a further inquiry. Cf. *United States* v. *Crosby*, 294 F. 2d 928, 949-50 (2 Cir. 1961), cert. denied sub nom. *Mittelman* v. *United States*,

368 U. S. 984 (1962); *United States* v. *Dardi*, 330 F. 2d 316, 332 (2 Cir.), cert. denied, 379 U. S. 845 (1964).

VII.

A veritable broadside of attacks is levelled at the charge, many of which, like some other points we have not discussed, go beyond the bounds of fair argument in their distortions and partial quotations. Only two require comment.

From opening statement through cross-examination to summation defense counsel properly hammered on Caron's expectation of a pardon in return for his cooperation with the Government. Caron freely admitted this. He testified that shortly before giving evidence at the Texas trial he told a Department of Justice attorney that he "was going to apply to the Pardons Attorney in Washington for executive clemency"; that the Department of Justice attorney and at least two customs agents promised to back him up; that the attorney had confirmed this only a month before the Connecticut trial; and that his application was currently pending before the Pardon Board. The judge's charge on this subject is quoted in the margin.[8] In the

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8 "Now, if you find that the Government has purchased the testimony of Mr. or Mrs. Caron with gold or with liberty, with extra favor, either given or promised to him, you will acquit this accused. I mean such conduct would not only be reprehensible but it would be unconstitutional. So, if you find that to have been the case, you acquit the defendant.

"On the other hand, if you do not find that the Government purchased or agreed to pay the Carons for testifying against the defendant you will, of course, disregard the claim completely.

"There isn't any doubt that some in the Government organization have indicated a belief, or at least some judgment, that Mr. Caron does deserve some consideration on an application for a pardon. Well, I don't know what all the nuances of that are and neither do you, I guess, except to what appear here.

"What appeared is that he, as a relatively minor cog in this operation, did tell the whole story. But this determination, whether or not he is entitled to any consideration which might fit in with those considerations

course of defense counsel's exceptions there occurred a colloquy which we also reproduce.[9]

The judge's charge was accurate save in the particular that pardons are handled not by a "Board" but by the Attorney General on the recommendations of the Pardon Attorney who reports through the office of the Executive Assistant to the Attorney General, 28 C. F. R. Part O (Subpart G) and Part 1 (1967). The judge had not indicated "that the Pardon Board is not a part of the Department of Justice," as defense counsel mistakenly recalled, but only that the pardoning authority was independent of the Criminal Division. If the defense had wished it made clearer that recommendations for executive clemency were transmitted to the President by the Attorney General on the recommendation of a Pardon Attorney in the Department of Justice, there is every reason to believe the judge would have done so. Moreover, Caron's testimony had made it altogether clear that he had been assured of the backing of the Criminal Division staff in his plea to the Pardon Attorney. We cannot agree with appellant that the jurors would have been "most surprised to learn that less than a month after the trial" Caron's sentence was

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that the pardon authority takes into account, is for the Pardon Board. Nobody in the Department of Justice, Criminal Division, has any authority whatsoever to release anybody who has been sentenced to a term of imprisonment by a Judge of the Federal Court. If there is any commutation or alleviation of that sentence it has to be done by the prison authorities through the Pardon Board."

9 "Mr. Flynn: Your Honor indicated that the Pardon Board is not a part of the Department of Justice. I respectfully except to that comment by the Court and suggest that the Pardon Board is a subsidiary office of the Attorney General of the United States.

"The Court: Well, all right.

"What about that, Mr. Newman? What about that?

"Mr. Newman: Your Honor's remark, as I heard it, was that the pardon office is not part of the criminal division, and that is correct.

"The Court: All right."

commuted to expire at once; on the contrary, the testimony left no doubt that Caron would have been unpleasantly surprised if, after two years' incarceration, it had not been.[10]

Miller had requested a charge that his failure to testify did not create any presumption against him, and that the jury must not permit such failure to weigh in the slightest degree against him or allow it to enter into the discussion or deliberations in any manner; the judge inadvertently failed to give this as promised, although he had instructed as to the presumption of innocence and the Government's burden to overcome this by evidence beyond a reasonable doubt. After completing his charge, the judge told the jury that it might proceed to consider the case but that, while its consideration was going on, he would entertain exceptions to the charge and recall the jury if any corrections or additions were to be made. After hearing counsel the judge announced he would supplement his charge in some particulars including this one; he said he would try to frame the instruction in a way that would avoid any

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10 Caron testified that among the things he listed on his application for clemency as worthy of the Pardon Officer's consideration was his testifying "for the Government in this case," and that one reason he agreed to testify was his "hope . . . [to] get out of the penitentiary." He admitted that he was going to ask the Government to send him to a trade school in consideration of his cooperation in testifying, and that customs agents "said they are going to find me a job and hide me some place in the United States." The assistant matron of the county jail in Galveston, Texas, where Caron was confined during the Texas trial, called as a defense witness, testified Caron had said he would have to serve a little over three years if he didn't come up to Connecticut and identify the man who was to be tried there but that he would have to serve "approximately ninety days at the most" if he did, and was then going to be sent to a "butcher school." She also told of having mailed to Attorney General Katzenbach a letter, written by Caron with the assistance of a Department of Justice attorney, and of Caron's saying "he would get out in approximately ninety days if that paper went through . . . ."

adverse emphasis from its being given in a supplemental charge after twenty minutes' deliberation. He was eminently successful in doing this, both by a general instruction that the jury was not to consider that he meant the matters in his supplemental charge to receive "any extra emphasis" and by his adept phrasing of the particular charge requested. While we do not regard the practice of allowing the jury to begin its deliberations pending the hearing of exceptions to the charge as desirable, no one objected at the time, and it is too late to do so now.

We have considered defendant's other claims of error but deem it unnecessary to discuss them. In fact we fear that the length of this opinion, written in deference to Miller's claim of innocence, and the identification of a few points where, with the advantage of ample time for reflection, we have thought some other course might have been preferable, may give a false impression of this trial. As we said in *United States* v. *Kahaner,* 317 F. 2d 459, 485 (2 Cir.), cert. denied, 375 U. S. 836 (1963), "Absolute perfection in trials will not be attained so long as human beings conduct them." Judge Blumenfeld had the hard task of presiding over a trial that was protracted and often was made more heated by defense counsel than it need have been; he discharged his difficult duties with patience and with skill. Here, as in the cited case, we hold that the issue of defendant's guilt "was placed before the jury in a manner that was fair and in accord with applicable rules of law."

The judgment of conviction is affirmed.

SUPREME COURT, U. S.

No. 857

FILED

JAN 15 1968

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

JAMES MILLER, a/k/a FRANK JAMES COPPOLA,
PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 381 F.2d 529.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on July 26, 1967. A petition for rehearing was denied on September 26, 1967. Mr. Justice Harlan extended the time for filing a petition for a

writ of certiorari to November 25, 1967, and on November 24 the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the identification of petitioner by an alias in the indictment was proper.
2. Whether the action taken by the trial judge after learning that three jurors were aware of an improper communication to one of them was correct.
3. Whether there were prejudicial irregularities in the pretrial conduct of the government agents or counsel, or resulting from the secretion of the children of the principal witness at trial.
4. Whether the trial court's instruction on the statutory presumption arising from the possession of narcotics was correct.
5. Whether the evidence was sufficient to establish petitioner's identity as the person who received shipments of narcotics on two occasions.

STATEMENT

After a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of conspiracy to import narcotics into the United States, in violation of 21 U.S.C. 174. On September 26, 1966, he was sentenced to imprisonment for twelve years. The court of appeals affirmed.[1]

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[1] While this petition was pending, the district court, on November 20, 1967, denied petitioners' motion for a new trial. In view of petitioner's reference to an alleged confession to

The indictment, returned in the Southern District of Texas on May 27, 1964, charged petitioner and six others with conspiring from January 1, 1963 to the date of its return to smuggle narcotics from Canada and Mexico into the United States.[2] Petitioner, who resided in Connecticut, was alleged to have received two shipments of narcotics from Canada, in furtherance of the conspiracy.

The evidence showed that prior to June, 1963, Lucien Rivard, Charles Groileau, Jerry Massey, and Joseph R. Jones (co-defendants convicted in the Southern District of Texas) were in the business of importing substantial quantities of narcotics from Europe and smuggling them into the United States from their home base in Montreal (Tr. 155).[3] In June, 1963, Massey introduced Joseph Caron—the principal prosecution witness—into the operation. With Massey's assistance, Caron obtained a 1962 Chevrolet, suitable for carrying loads of heroin.

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this charge by another man (Pet. 8), we have set forth as an appendix to this brief a copy of the district court's opinion on petitioner's motion for a new trial which details the suspicious circumstances surrounding the obtaining of this confession.

[2] Four of petitioner's co-defendants, all Canadians, were convicted in the Southern District of Texas and sentenced to terms of imprisonment varying from ten to twenty years. Their convictions were affirmed by the Fifth Circuit on April 18, 1967. *Rivard* v. *United States*, 375 F.2d 882. The remaining two co-defendants have not yet been arrested. The court transferred petitioner's case to Connecticut.

[3] The twenty-volume transcript of trial ("Tr.") has been filed with the Clerk of this Court.

Thereafter, Massey and Jones travelled to Europe on different ships to obtain supplies, each taking an automobile with him. Subsequently, Caron received a call from Groileau, informing him that "Massey was on his way back with a load," and instructing him to proceed to the pier to check for police (Tr. 203). Caron met Massey at the pier, where Massey's car was unloaded from the ship. Massey later told Caron that his car contained sixty-eight pounds of "white powder." (Tr. 212).

In August, 1963, Massey told Caron that he would be taking the load into the United States (Tr. 216-217). At first, Caron was told that his destination would be Flint, Michigan, and Caron received explicit directions as to the place in that city where he would meet his American contact (Tr. 217-218). Later, Rivard (the apparent head of the organization) changed the itinerary, and told Caron to travel to Bridgeport, Connecticut (Tr. 218). Massey loaded Caron's car with narcotics, and told him that his destination was the Bridgeport Motor Inn, where he was to register under the name Mr. Robert (Tr. 221).

Caron, accompanied by his wife, arrived at the Bridgeport Motor Inn at approximately 5:30 a.m. on Tuesday, August 20, 1963 (Tr. 223, 1856-1859). On arrival, Caron registered as Mr. Robert, and, pursuant to instructions, left his car in the motel parking lot with one door unlocked, his keys and registration card in the ashtray, and a paper upon which his room number was noted on the windshield (Tr. 225-227). Shortly thereafter, petitioner came to his room bear-

ing the keys and registration card, and informed Caron that he could not take the car that day. The next day, petitioner telephoned, saying once again that he could not take the car (Tr. 230). The following morning, August 22, petitioner phoned again and told petitioner that he would pick up the car that day.[4] Caron then locked all but one door of the Chevrolet and left the keys and registration in the ashtray as before (Tr. 233). When Caron went to lunch, he noticed that the car was gone. At approximately 4 p.m. petitioner returned the keys and registration to Caron in his motel room and gave Caron $50 to defray the cost of staying longer at the hotel than planned (Tr. 241).

When Caron returned to Montreal he communicated with Rivard, who asked him "How is Frankie my friend?" (Tr. 256). Caron, who had not previously known the name of his Bridgeport contact, informed Rivard that he was well. When Caron remarked that "Frank" had "beautiful hair," Rivard replied that Frank was a hairdresser (Tr. 255).[5]

In September 1963, after Jones returned from Europe with another supply of heroin, Caron was again sent to Bridgeport. Rivard, who had been disturbed

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[4] Petitioner told Caron that he had been up late the night before. A defense witness, petitioner's uncle by marriage, stated on cross-examination that he had been with petitioner at the latter's home on Wednesday night, August 21, until 2 a.m. the following morning (Tr. 2683-2684).

[5] The evidence adduced by both parties established that petitioner was the owner of one prosperous beauty shop in Milford, Connecticut, and had an interest in others.

by the three-day delay in effecting Caron's first delivery, told Caron that he would contact Frank and tell him to "make it fast. They won't hold you there no more three days." (Tr. 259). The directions given to Caron were similar to those for the first trip. This time three of his children—the eldest about nine years old—as well as his wife accompanied him (Tr. 259). Caron crossed the border on September 20, made his call to Rivard, and, after spending the night in Albany, arrived at the Bridgeport Motor Inn in the early afternoon of September 21 (Tr. 1862). After his wife checked in under an assumed name, Caron took his family to an adjoining restaurant. While sitting in a booth by a window, Mrs. Caron observed two men, one of whom was petitioner, standing by their Chevrolet in the motel parking lot. She called this to Caron's attention (Tr. 262, 1594-1595). Caron went to the car, where he met petitioner and another man, and gave petitioner the car keys and registration card. Petitioner told Caron to meet him in the restaurant after his family had eaten. Caron rejoined his family, but shortly thereafter petitioner came over to their booth and told Caron, "Come on, let's go." (Tr. 264). Caron and petitioner sat in another part of the restaurant, where petitioner told him that twice was enough and that he should not return to Bridgeport because it was too risky: "Next time tell Rivard to send you to Flint, Michigan." (Tr. 264). Petitioner and Caron proceeded in the latter's car to a nearby traffic light, with the other man following in another car. At the light, Caron was told to walk

back to the motel, while petitioner drove away (Tr. 266). Later that day, the car was returned.

Caron was arrested on October 10, 1963, after his car was searched by customs agents in Laredo, Texas, and a cache of heroin discovered (Tr. 4-27, 48-49). On February 26, 1964, Caron, who had pleaded guilty to violating the narcotics laws, was sentenced to imprisonment for ten years (Tr. 501).

ARGUMENT

1. The indictment identified petitioner as "Frank James Coppola alias James Miller." Prior to trial, the government informed the court that petitioner's true name was James Miller and that Coppola was the alias. At the commencement of trial the court read to the jury array the style of the case, listing the seven alleged conspirators, including "Frank James Coppola alias James Miller." He then stated "The only defendant who will be tried here today in this case is the defendant James Miller. The Court has been informed that the defendant's name is James Miller alias Frank James Coppola" (Pet. 14a; 381 F.2d at 536). Throughout the month-long trial, petitioner was referred to solely as James Miller, and the name Frank Coppola appeared only when relevant evidence was introduced to support the government's contention that petitioner was the "Frank" whom Caron had met in Bridgeport (See Pet. 8).

At the trial, the principal claim of the defense was that Caron's identification was unworthy of belief, and that petitioner was not known by the name

Frank. In support of this claim, defense counsel attempted to show that several other individuals, some named Frank—including one who had been a hairdresser in Connecticut with a prior narcotics conviction [6]—might have been the guilty party. In rebuttal, the prosecution introduced an arrest record dated 1949 bearing petitioner's picture and fingerprints and the signature "Frank Coppola." With a proper limiting instruction to the jury as to the purpose for which it could consider the record, the court admitted it in evidence (Tr. 3359; Govt. Exh. CF).[7]

In his closing charge the trial judge referred to the name Frank James Coppola only when reading the indictment. For the remainder of his lengthy charge he called petitioner James Miller, and advised the jury, "Now, as you know, this case involves criminal charges brought by the Federal Government against the defendant, James Miller. We referred to him here as James Miller." (Tr. 3612). The trial judge also told the jury that the indictment was not evidence "even in the slightest degree." (Tr. 3611).

Contrary to petitioner's contentions, he was not tried under a "phony alias" (Pet. 12). The alias was an essential part of the government's case, since its principal witness never knew petitioner as James Miller, but learned from his co-conspirators that his

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[6] The government proved that the hairdresser named Frank had been in prison at the time of the first shipment of narcotics to Bridgeport (Tr. 3286).

[7] Defense counsel admits knowledge of the existence of the arrest record prior to trial. Pet. 13.

name was Frank and his occupation was that of a hairdresser. Moreover, petitioner founded his defense upon a claim of mistaken identity, asserting that he was not Frank and since early childhood had been known only as James Miller (Tr. 3086-3102, 3127-3151. Def.Exhs. 36-50).[8] This, then, was not a case of "loading indictments with unnecessary aliases", as deplored in *United States* v. *Monroe*, 164 F.2d 471 (C.A. 2), certiorari denied, 333 U.S. 828, relied upon by petitioner in the court below. As stated in *United States* v. *Solowitz*, 99 F.2d 714, 715 (C.A. 7):

> Of course, if a person has used names other than his right name, as the record discloses was the case so far as appellant is concerned, and the Government proves such aliases, there can be no legitimate complaint. * * *

See also *United States* v. *Melekh*, 193 F. Supp. 586 (N.D. Ill.).[9]

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[8] Petitioner argues that the arrest card bearing his fingerprints and the name and signature "Frank Coppola" was introduced in the government's rebuttal as an unconscionable tactic to prevent his taking the stand and explaining it away. This argument is little more than an afterthought. When the arrest record was introduced, defense counsel made several objections, based upon remoteness, hearsay, lack of authentication, and the inflammatory nature of the exhibit. No claim was made that petitioner was precluded from attacking the exhibit by taking the witness stand. Petitioner made no request to the trial judge to allow him to testify at that juncture out of the presence of the jury (Tr. 3346-3354).

[9] *United States* v. *Grayson*, 166 F.2d 863 (C.A. 2), upon which petitioner bases his argument, is not to the contrary. There, Judge Learned Hand reviewed an assertion of prejudice arising from an unnecessary reference to an alias in the

2. During the trial, the court admonished the jurors not to listen to radio and television reports or to read newspaper accounts of the trial. He also told them to report incidents involving information about the trial received from outside sources. In the fourth week of trial, when petitioner's defense was being presented, the court, out of the presence of the jury, informed counsel that he had received information that some jurors had heard rumors that they would be in danger if a verdict favorable to petitioner were not reached. The principal defense counsel, Mr. Foreman, suggested that the court conduct a hearing in chambers to determine the effect of the threat upon the partiality of the jurors involved. The court indicated to counsel that he would like to discuss the matter with the jurors immediately. Defense counsel, however, requested that the discussion be delayed and that he be allowed to finish his case (Tr. 3700). Defense counsel suggested that no counsel be present when the court conducted its inquiry (Tr. 3705).[10]

After all evidence had been presented, the court met with the three jurors involved, and learned that, at a dinner party attended by one of them, a friend had

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indictment. Since the defendant's identity had not been in issue, Judge Hand found no justification for the inclusion of the alias. Nevertheless, he discussed this and two other claims asserted by the appellant in a group of "least important" claims and concluded that, even though two of the three were meritorious, they "would not in our judgment even remotely tend to justify a reversal." 166 F.2d at 867.

[10] Counsel had agreed to waive petitioner's presence at the conference, and had received petitioner's express waiver of his presence (Tr. 2790-2792).

told him that another man residing in the same general area had informed him that a certain "bunch" in Torrington would "get after you" and "beat you up" after the trial (Tr. 3718). This juror had mentioned the incident to the other two jurors. The court carefully discussed the subtleties of the situation: that it might cause a subconscious reaction of hostility toward petitioner. The following ensued (Tr. 3720):

> THE COURT: * * * But the question is whether or not, in the face of that remark and those circumstances of which you are aware you feel in your own mind that it will have no effect whatsoever upon your decision in reaching a verdict in the case:
>
> JUROR PARSONS: No.
> JUROR BALDWIN: No.
> JUROR LESTER: Not a particle.

One of the three then informed the court that there were two places in Torrington where his grandsons had reported dope being sold, apparently suggesting to the trial judge that he advise the proper authorities about it. The juror added that "it doesn't affect me any, only to the extent I have grandsons, and so forth." Upon further questioning from the court about the effect of such extrinsic information on this case, he stated "it has nothing to do with me. I will say it the way I see it." (Tr. 3718-3723). The conference ended after the trial judge was assured that no other jurors were aware of the incident. The judge then met with counsel and advised them of his conference with the jurors, observed that he was satisfied that they were not intimidated in any way, and

that no prejudice would result to either side from the rumor (Tr. 3371).

The record shows that the purpose of the court's inquiry was to protect the rights of petitioner, and not, as petitioner contends, to avoid granting a mistrial and thereby rendering useless four weeks of work. See *United States* v. *Borelli*, 336 F.2d 376, 392 (C.A. 2), certiorari denied *sub nom. Mogavero* v. *United States*, 379 U.S. 960. Unlike *Remmer* v. *United States*, 350 U.S. 377, the court conducted a full and fair investigation of the incident with the three jurors who were aware of it. There is no foundation for a belief that any of the jurors were placed "under a terrific pressure" (see *Remmer*, *supra*, at 381), because of the communication of the cocktail party gossip. While, as the court of appeals noted, it might have been better to have interviewed each of the jurors individually, the failure to do so was not, in the circumstances, a misuse of the broad discretion of the trial judge in this area.

3. The assertion that the government wilfully destroyed or withheld evidence or resorted to improper tactics has no basis in the record.

(a) The claim regarding unfair publicity in Connecticut is carefully reviewed in the court of appeals' opinion which notes that, whether or not certain agents of the government provided information to the press when petitioner was arrested, trial did not occur until two years later. The trial court, in its thorough voir dire and instructions during the trial, adequately ensured that the selected jurors had no preconceived prejudices.

(b) The car in which Caron was apprehended in Laredo was the one which petitioner had had in his possession for a short time during Caron's last trip to Bridgeport some three weeks before. The car was forfeited and used by the government in normal course. In September, 1964, several months after petitioner was indicted, defense counsel, in a letter to the United States Attorney, indicated an interest in inspecting the car. The record is silent as to any further steps taken by petitioner until July 15, 1965, when a motion was made for an inspection and promptly granted. No attempt was ever made by the defense to avail themselves of the opportunity to inspect the car. When petitioner's case was transferred to Connecticut, counsel moved to dismiss the case because, they alleged, the use of the car by the government effectively destroyed its evidentiary value. This motion was denied. At trial, the car was not introduced in evidence, and the prosecution did not rely on any scientific examination to establish that heroin had been transferred in it. When defense counsel asserted that scientific evidence could have established the absence of heroin in the car if such an examination had been made, the court responded that it would allow counsel to offer proof to that effect. Counsel made no attempt to do so.

The claim is now made (Pet. 20-21) that, if the car had been preserved as it was when first seized, it might have yielded evidence as to the identity of the "Frank" who had driven it three weeks before the seizure, and that the government deprived petitioner of evidence by not itself undertaking a scientific in-

vestigation for that purpose. However, if petitioner thought the car might yield evidence useful to him, he should have moved more promptly for an inspection.

(c) Prior to and during the trial, the whereabouts of witness Caron's wife and children had been kept secret by the government because of threats received by Caron that they would be harmed if he cooperated with the government. The government produced Mrs. Caron at trial and she testified concerning the two trips she made with her husband to Bridgeport. When defense counsel requested the production of the two eldest children who had accompanied their parents on the second trip to Bridgeport (the older was nine years old at the time), the government expressed a reluctance to reveal their whereabouts (Tr. 405-407; 423-427). Later in the trial, government counsel informed the court that he had been advised of no medical reason why the children could not be brought to the trial, and agreed to bring them to the jurisdiction to accept a subpoena, if defense counsel so desired (Tr. 1264-1270). At that point, defense counsel, Mr. Foreman, requested a two step procedure: first a court ruling giving him an opportunity to interview the children, and secondly, their production as witnesses if defense counsel so desired. Government counsel then stated that every witness had the right to refuse to be interviewed, and that, since the children were minors, their lawful guardian, Mrs. Caron, would have to decide whether she wished the children to be interviewed by Mr. Foreman in advance of any court appearance (Tr. 1267). The court announced

that it would consider Mrs. Caron the lawful guardian of her children and agreed that she had authority to decide whether they would be subjected to an interview (Tr. 1271-1274). The following day of court, government counsel reported that, at a meeting attened by himself, Mr. Foreman, and Mrs. Caron, she had expressed unwillingness to have the children interviewed (Tr. 1478). However, government counsel further advised the court that the children would be brought to the jurisdiction for the purpose of being available to accept a subpoena if Mr. Foreman so desired. No further steps were taken by the defense during the remainder of the trial and the children were not called as witnesses.

The court's ruling that Mrs. Caron had the right to refuse to subject her children to an interview with defense counsel was clearly correct. It is hardly a novel rule of law that witnesses have the right to refuse to be interviewed if they so desire and are not under legal process. *Byrnes* v. *United States*, 327 F.2d 825 (C.A. 9), certiorari denied, 377 U.S. 970. Since the witnesses here were young children, it was proper for the court to rule that the decision to subject them to an interview would be made by their parent. At the same time, to protect the defendant's right to summon witnesses in his own defense, the trial judge agreed that the children must be made available for subpoena.

In addition, we point out that the assistance that these children might have given the defense's case was negligible at best. The children saw "Frank" only momentarily when he approached the booth where

they were eating lunch and requested Mr. Caron to come along with him. It is inconceivable that at trial two and one-half years later they would have been able to recollect such a brief encounter with a stranger whom they had no special reason to remember. The jury would hardly have been impressed if they could not have identified petitioner.

(d) From the inception of the trial, petitioner attempted to convince the jury that Joseph Caron was totally unworthy of belief.[11] To further this attempt, defense counsel subjected Caron to seven days of cross examination, during which time he posed numerous questions suggesting that Caron had bargained with the government for his freedom in exchange for his testimony. Each attack was met with denials that any deal had been made whereby Caron would be freed if he gave testimony to convict petitioner (Tr. 445-448, 496-497, 540, 555, 830). Caron admitted that shortly before giving evidence at the trial in Texas (September 1965) he had informed a government attorney of his intent to seek a pardon, that the attorney and other government agents promised to support him, and that his application was currently pending before the Board of Pardons. Caron further stated that he had talked to the assistant prosecutor, Mr. Butler, about the matter, and received a reply, that, if he told the truth, Butler would also support the request for clemency (Tr. 1546).

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[11] As early as his opening remarks, Mr. Foreman charged that the government "purchased" Caron's testimony.

Among the many motions made by defense counsel were requests pursuant to 18 U.S.C. 3500 for certain materials relating to the possibility of a pardon (Tr. 513). The court, noting that it had called upon the government to produce many other materials that were "peripheral", "out of an abundance of assistance to counsel for the defense", told government counsel that it would not require production of the applications for clemency (Tr. 1243-1245). In light of the admission by Caron that he had sought a pardon prior to testifying and that federal officials had stated that they would support his application, there was no error in the trial court's refusal to order production of the pardon application.

4. In his charge to the jury, the trial judge set forth all of the elements of the offense. As to one of these elements—knowledge that the drugs had been imported into the United States contrary to law—the court indicated that the government could establish knowledge in two ways: the "normal way" (Tr. 3619), *i.e.*, the testimony that Caron, a French-speaking Canadian, had identified himself to petitioner as a courier from Canada, and had brought with him from Canada a car bearing Canadian registration and license plates; or, said the court, the government could rely on the statutory presumption of knowledge arising from proof of possession, which "shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury." (Tr. 3620). The court further instructed (Tr. 3620-3621):

Now, that statute that I have just read does not change the fundamental rule that a defendant is presumed innocent until proven guilty beyond all reasonable doubt. Nor does it impose upon a defendant the burden of producing proof that the narcotic drug was lawfully imported, or any other evidence. As previously stated, the burden is always upon the prosecution to prove guilt beyond all reasonable doubt.

What that statute means is that upon a trial for a violation of this statute if the jury should find from the evidence beyond a reasonable doubt that a defendant has had possession of the narcotic drug as charged, the fact of possession alone, unless explained to the satisfaction of the jury, permits you to draw the inference and find that the narcotic drug was imported contrary to law, and to draw the further inference that the defendant had knowledge that the narcotic drug was imported contrary to law.

Now, in connection with any explanation a defendant may choose to offer for having possession of a narcotic drug, you are reminded that in the exercise of constitutional rights the defendant need not testify. Possession may be explained through other circumstances and other evidence, independent of testimony of the accused.

Later, the court emphasized that petitioner was not required to testify, that his failure to take the witness stand created no presumption against him "and I instruct the jury that you must not permit this fact to weigh in the slightest degree against the defendant, nor should this fact enter into your discussions or deliberations in any manner." (Tr. 3683).

The sole function served by the instruction on the statutory presumption was to allow the jury to infer that petitioner had knowledge of the illegal importation.[12] This instruction did not eliminate the prosecution's burden of proving all of the elements of the offense charged, and the quoted portions clearly establish that petitioner's right to silence was not destroyed. To the contrary, the instructions were "carefully directed to the evidence as a whole, with neither allusion nor innuendo based on the defendant's decision not to take the stand." *United States* v. *Gainey*, 380 U.S. 63, 71. See also *United States* v. *Armone*, 363 F.2d 385 (C.A. 2), certiorari denied, 385 U.S. 957; *United States* v. *Aiken*, 373 F.2d 294 (C.A. 2), certiorari denied, October 9, 1967 (No. 94, this Term).

5. Petitioner's insistence that he was unfairly convicted prompts a review of the testimony given by Caron identifying him as the recipient of two shipments of heroin. The record does not bear out petitioner's allegation that he was the victim of mistaken identification. The testimony of Caron was clear and unequivocal. He admitted his role in the conspiracy while recounting his three sojourns in its furtherance. He was unshaken in his identification of petitioner as the "Frank" to whom he twice delivered large amounts of heroin. Caron never identified any other

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[12] The validity of the presumption with regard to the connection between possession and knowledge of illegal importation was recognized by this Court as early as *Yee Hem* v. *United States*, 268 U.S. 178.

man as Frank. On one occasion after his imprisonment, when shown several pictures by government agents, Caron selected one of Anthony Mancuso [13] as resembling petitioner, but pointed out the significant differences in features between Frank and the photograph of Mancuso (Tr. 2074-2079, 2312-2316). In February 1964 Caron was taken from the prison to Bridgeport to observe locations which government agents knew petitioner to frequent. Although totally unfamiliar with the locations and unaware where and at what time he would see petitioner, Caron tentatively identified petitioner the first time he saw him, but requested another opportunity to obtain a closer look before making a positive identification.[14] The following day he received that opportunity and, without anyone calling his attention to petitioner, Caron pointed him out and made a positive identification (Tr. 757-772, 2119-2122, 2144-2148).

Attempts by defense counsel to show that the person who received the narcotics from Caron in Bridgeport was Frank Lucien (Tr. 690, 697, 813), Mancuso (Tr. 733), Frank Piccolo (Tr. 2195-2197, 2305-

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[13] Caron never identified a picture of anyone named Frank Mancuso, as petiitoner charges (Pet. 25).

[14] Caron's observations were made from a truck, in which he and several federal and state officers were passengers. The truck drove to a number of locations before parking in a shopping center lot, where Caron made his first tentative identification of petitioner. The next morning the truck drove to a parking lot in the rear of petitioner's salon. Caron positively identified petitioner after the latter arrived in his car and parked adjacent to the truck (Tr. 495, 756-772, 2118-2124, 2138-2148, 2259-2290).

2306), or Frank Musial (Tr. 3268-3271) were entirely unsuccessful, as were counsel's attempts to show that petitioner was working in his salon at the time the shipments of narcotics were supposed to have been transferred to him.

The complaint of unfairness on the part of the prosecution is without foundation. To the contrary, the prosecution's fairness was acknowledged at trial by defense counsel, who at one point told the court: "I never had a more courteous prosecution, your Honor. I am not complaining about any treatment whatever." (Tr. 929-930).[15]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1968

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[15] The petition for certiorari contains other unsubstantiated charges which are mere conjecture by petitioner's attorneys. As to one of these allegations—wiretapping (Pet. 25)—as early as July 23, 1964, in an affidavit opposing a motion to suppress, the government responded, "This charge is completely unfounded in fact and untrue." (Tr. 2180, 3797-3805).

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. 11,191

UNITED STATES OF AMERICA

-vs-

JAMES MILLER

RULING ON MOTION FOR NEW TRIAL

The defendant moves for a new trial on the ground that newly discovered evidence reveals that the government witness Michael Caron made a mistaken identification. At the trial, only obliquely did the defense question the fact that two separate loads of narcotics had been delivered to a man in Bridgeport. The dominant issue was whether that man was the defendant James Miller. His defenses were an alibi and mistaken identification. After hearing extensive evidence, the jury resolved both factual issues against him and found him guilty of conspiracy to smuggle heroin into the United States in violation of 21 U.S.C. § 174. The case was vigorously defended at trial and exhaustively prospected for error on appeal. The conviction was affirmed. *United States* v. *Miller*, 381 F.2d 529 (2d Cir. 1967).

The defendant now comes forward with evidence that one Mario Natalizio has confessed to being the man to whom the deliveries of heroin were made. As indicated, the identification of that man as Miller at the trial did not go unchallenged. A substantial portion of the trial which extended through every trial day of May 1966 was devoted to undermining the

identification of Miller by Caron, the carrier who delivered the heroin at Bridgeport, and by his wife, who accompanied him to Bridgeport on both trips. The defense in a cross-examination of Caron which lasted seven days resorted to all of the generally used methods for attacking Caron's credibility in great detail. He was questioned about his prior criminal conduct;[1] his making of knowingly false statements; the existence of bias on account of promises by the government to assist him in obtaining a pardon (he had been sentenced to ten years imprisonment in Texas), because of money paid by the government toward the support of his wife and young children in this country, and the government's grant to him of admission to the United States as a permanent resident; and more. The circumstances under which he made his pre-trial identification of Miller were thoroughly probed. See *United States* v. *Miller*, 381 F.2d at 537-38. It was also suggested that a Connecticut state policeman had contrived to have Miller identified to satisfy a personal grudge against him.

From another aspect at trial, the defense suggested that Caron was mistaken; that the "Frank" to whom he said he made the deliveries was some other Frank. They suggested it was Frank LeChien (Tr. 690-95) or Frank Musial (Tr. 3242-56). It introduced a mug shot and police record of the latter into evidence, but on rebuttal the prosecution proved that Musial was safely in jail when the deliveries were made. This brief exposition of the extent to which the identification issue was litigated at the trial will serve as a background against which the defendant's motion for a new trial should be considered.

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[1] Inquiry about criminal conduct which had not been established by conviction was permitted.

The rule is that when a motion for a new trial is based on newly discovered evidence, the moving party must satisfy the court that the evidence is newly discovered, that it was unknown to the defendant at the trial and that such absence of knowledge was not due to any lack of diligence on the part of the defendant. Being "new" as so tested is not enough. The evidence must also be material, not merely cumulative or impeaching—such that it will probably produce and acquittal. *Berry* v. *State*, 10 Ga. 511, 527 (1851); *cf. United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir. 1958). Motions for new trials are not favored and should be granted only with great caution. *United States* v. *Johnson*, 327 U.S. 106 (1946).

These several aspects from which the evidence should be considered must be examined more fully.

The principal item of evidence offered is a written confession in the handwriting of Mario Natalizio.[2] In fact, there are two different version of a confession, each on two sheets of paper, and each sheet dated July 12th. Three pages were signed by Natalizio. These were mailed from Miami, Florida, on July 14, 1967, in a plain envelope addressed: "Webb Manuturing [sic], Box 510, Milford, Conn." [3] They were received at that address by Mr. Richard H. Simons, who is the president of Webb Mfg. Co. He is also the defendant's attorney and has been acting as such throughout this entire criminal proceeding.

Is the confession newly discovered?

Before considering the content of the confession with respect to its materiality or its likely effect in

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[2] Items offered to corroborate the confession are referred to later.

[3] It is obvious that the handwriting on the envelope is written by a hand different from that of Natalizio.

the event of a new trial, the question is whether it is newly discovered, i.e., since the trial.

Obviously, the written statement signed by Natalizio in July 1967 stating that he was the man who received the narcotics in Bridgeport on August 22nd and September 21st in 1963 from Caron is new in its present form. But the substance of it, that Natalizio and not Miller was the Bridgeport member of the conspiracy to whom the deliveries were made, is *not* new. So far as that may be accurate information, both Miller and his attorneys knew about it in 1965, long before the trial.

The affidavit of Mr. Simons states that on January 8, 1965, he again informed the Chief Assistant United States Attorney for the Southern District of Texas "of the facts pointing to Natalizio's guilt and Miller's innocence. . . ." More to the point, his affidavit continues: "On August 6, 1965, I caused James Miller, under the direct supervision of three private investigators, to confront Natalizio with knowledge of his participation in the transactions at the Bridgeport Motor Inn in August and September, 1963, and to demand that Natalizio provide the defense with the times on which the meetings with Caron occurred . . . . Miller also asked Natalizio for money for the defense. . . ."

At the hearing on the present motion, the defendant offered a purported transcription of a taped recording of this Miller-Natalizio confrontation.[4] Reading it

[4] The transcription and tape were marked for identification at the hearing on October 9, 1967. Upon the filing of another affidavit by Mr. Simons on October 16, 1967, attesting to their authenticity the identification limitation was stricken. I have read the transcription, but have not listened to the tape. I do not pass on whether the tape and the transcription are authentic, but it should be pointed out that

without reference to the stage business interjected into the script, Miller, wearing a concealed transmitter strapped to his thigh, introduced himself: "My name is Jimmie Miller, you hear—Jimmie Miller. . . . I'm Jimmie Miller the guy who got pinched in place of you in Bridgeport. Do you know now?" Natalizio to Miller: "You're innocent of the whole rap." Then Miller, aware of the fact that Caron had already identified him and had told the authorities the time and surrounding circumstances of the deliveries of narcotics at Bridgeport, informed Natalizio of this. Miller asked him: "Now think. What time? Just give me the time.[5] That's all I need. And money. Now if you're in trouble, or whatever you're saying, I'm in worse trouble." Natalizio said: "I'm glad you come. Between you and I, I don't sleep. I got you on my mind more than you got yourself on your mind. Whether you realize it or not. Whether you realize it or not, I've got you on my mind until this thing is straightened out. I can't do nothing until I see this thing through."

Thus, as of August 6, 1965, Miller and his attorney admittedly knew and urged the prosecuting authorities to believe that there was evidence that Natalizio should have been cast in the role filled by Miller at the trial. Realizing that this is not newly discovered evidence, the defense argues that a confession made to the defendant is quite a different thing from a written confession. While a written statement may

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Natalizio has recently denied under oath that he made those statements on the transcription which might be construed as self-incriminating.

[5] Miller was emphasizing that he was faced with the need for this information for the purpose of limiting the number of witnesses he would need to substantiate his alibi defense.

be different in form from an oral one evidencing the same facts, its probative force is not necessarily greater. If anything, the tape record of the conversation between them *prior* to Miller's conviction, monitored as claimed by a reliable investigative agency, would have carried greater weight at the trial than the written confession given after Miller's conviction when there is little likelihood that Natalizio could be convicted.

As further support for his argument that *newness* should be tested by the probative value of the later found evidence, rather than by its subject matter, the defendant's motion alleges several other items to corroborate Natalizio's confession. While the corroborative merit of these items are open to serious question, these too are not newly discovered. One item is a written statement signed by Natalizio taken by government investigators on March 26, 1965, in which Natalizio denies that he was in Bridgeport between May 1962 and Christmas 1963. The defendant alleges that this "statement is demonstrably false." Quite apart from the fact that the attack upon the truth of Natalizio's statement rests primarily on hearsay statements made by Louis and Charles Schnee, the disbelief of the statement would provide no basis for concluding that the opposite is true. See *Dyer* v. *MacDougall*, 201 F.2d 265 (2d Cir. 1952). As Chief Judge Aldrich observed in *Janigan* v. *Taylor*, 344 F. 2d 781, 784-85 (1st Cir. 1965), "[w]ere the rule otherwise a case could be made for any proposition in the world by the simple process of calling one's adversary and arguing to the jury that he was not to be believed." Still, the criticism having been made, by using the same standards the defendant himself sets, Natalizio's written confession would not be worth of belief. But even if that self-contradiction

could be regarded as confirmation, *cf. United States v. Nuccio*, 373 F.2d 163 (2d Cir.), *cert. denied*, —— U.S. —— (1967), it too was not newly discovered.

The motion further alleges that in August of 1967 Natalizio twice orally confirmed the written confessions to two private investigators in the employ of the defense attorney. This bolstering of the confession does not make it any newer. Whatever bearing it may have on whether the "confessions" are true will be discussed later.

The defendant alleges that Natalizio undertook through Charles Schnee to have some registration cards removed from both the Bridgeport and Fairfield Motor Inns in October or November 1963 for dates in August and September. To the extent that there may have been maneuvering at Natalizio's instigation to get some cards from the Bridgeport Motel, Mr. Simons' affidavit[*] discloses that he knew this from Charles Schnee (whose hearsay statements only were offered here) in June of 1965, a year before the trial. It does not become new evidence by having it repeated to an investigator two years later.

There are noticeable infirmities in what Schnee is reported to have said. Nothing developed at the trial indicated that any conspiracy activity occurred at the Fairfield Motor Inn, which Schnee said was one target of Natalizio's card-pulling project. Second, except for an investigator's recent report of an oral admis-

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[*] Attorney Simons' affidavit states that in a telephone call to Charles Schnee from his office under subterfuge on June 24, 1965, Schnee admitted he was hired to get cards by "Mario." Two weeks later, Schnee told Simons' office it was not Mario but "Johnny Petella." After the trial, both Schnee's allegedly stated that they had been active in a card-pulling episode at Natalizio's instigation.

sion to him by Natalizio (hearsay again), the proof offered does not indicate that the cards attempted to be removed from the records of the Bridgeport Motor Inn had any relationship to the narcotics transaction.[7] And, third, even if Natalizio had attempted to remove the cards for the fictious names under which Caron had registered, that might implicate Natalizio, it would not necessarily exonerate Miller. There is some merit to the government's argument that the person who received heroin at the Bridgeport Motor Inn would in all likelihood be the last person to risk discovery of his role by openly expressing an interest in registration cards for the same motel for the very dates in question.

Another allegation is that "the description given by Michael Caron to Government agents on October 16, 1963, of the man to whom he delivered his car in Bridgeport fits Mario Natalizio and does not fit the defendant James Miller." (Defendant's Motion for a New Trial, p. 2, ¶ 7). Neither Natalizio's physical appearance nor Miller's are newly discovered. Caron identified Miller when he saw him prior to trial and he and his wife made an in-court identification of him.

To sum up, Natalizio's confession and the so-called "corroborating items" relating to the central issue that Natalizio rather than Miller was the guilty party were known by the defendant and his attorneys long before trial. While it is newly presented to the court, it is not newly discovered.

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[7] Natalizio denies that the person whose registration card was sought had any relation to the narcotics transaction.

Excuses for failure to use the evidence.

In a search for escape from the dilemma created by the obvious fact that the defense knew of the evidence of Natalizio's implication prior to the trial, the defendant offers several explanations, but all paths lead to dead ends:

1. The government should be estopped from asserting that the evidence is not newly discovered, because even after the government was permitted to read their transcript of the tape in 1966, it persisted in its claim that Miller was guilty, expressing doubts about the validity of the tape and whether Natalizio had exonerated Miller. This expressed attitude of confidence in Miller's guilt, it is claimed, led the defense to believe that if it offered the tape "the government would counter with some cogent evidence, however false in fact, that Natalizio was not guilty." This explanation is entirely without merit.

2. The government would have objected to the introduction of the tape on the ground of lack of proof of authenticity. If it is authentic, as the defense claims, there is no apparent reason why that could not have been established. In any event, the possibility of an objection by the prosecution is no excuse for failure to litigate the issue.

3. Miller would have had to take this stand to establish that the other voice on the tape was Natalizio's. This would have required him to waive his fifth amendment privilege. The fundamental right not to testify is not in issue here. The privilege is not both a shield and a sword. As stated in *Green* v. *United States*, 256 F.2d 483 (1st Cir.), *cert. denied*, 358 U.S. 854 (1958), "It will not do to say that the matter could not have been disclosed at the criminal trial without the personal testimony of Green who, as the

criminal defendant, was privileged not to testify. . . . Green cannot have it both ways. He cannot withhold the evidence, gambling on an acquittal without it, and then later, after the gamble fails, present such withheld evidence in a subsequent proceeding under 28 U.S.C. § 2255." (256 F.2d at 484). *Cf. Reiss* v. *United States*, 324 F.2d 680 (1st Cir. 1963); *United States* v. *Soblen*, 203 F.Supp. 542, 565 (S.D. N.Y. 1961), *aff'd*, 301 F.2d 236 (2d Cir.), *cert. denied*, 370 U.S. 944 (1962); *United States* v. *DiGregorio*, 148 F.Supp. 526 (S.D. N.Y. 1957). Viewed from another side, this was a staged confrontation at Natalizio's residence, not a chance meeting. There were investigators employed by the defense to "wire" Miller for the Miller-Natalizio confrontation, to be in the vicinity at the time, and to receive and transcribe the tape. It is difficult to see why they could not have identified Natalizio as the other party on stage with Miller.

4. Had the tape been offered and excluded, the government would have been able to float adverse innuendo. This requires no comment.

5. Now I come to the fifth and last point of the defendant's explanation why the evidence against Natalizio was not offered. The defendant was advised by counsel that if he offered the tape, revealing that he had been "wired" when he talked to Natalizio, he would incur a substantial risk of being murdered. The defendant does not claim that this was inept advice; on the contrary, the claim is made that "it was good, sound, advice." Whatever facts that advice may have been based on have not been revealed to the court.[8]

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[8] I find this logically difficult to reconcile with the claim that Natalizio confessed to relieve his conscience.

Perhaps the defense was faced with a serious problem of trial strategy.[9] Without claiming to know what it should have done with this evidence, one need have no hesitation in saying that, having made the decision not to offer it at the trial, the defendant cannot now assert that because such evidence still exists, he should have a new trial in order to present it.

The Repudiated Confessions

Since Rule 33 suggests that the court should be sensitive to any evidence which shows that the original trial resulted in a miscarriage of justice and weigh it carefully against the interest in finality and adherence to procedural requirements, 4 W. Barron, Federal Practice & Procedure § 2281 (Rules ed. 1951), it is advisable, to say the least, that the evidence of a confession by Natalizio on which the defendant relies be considered more fully.

There is little doubt that if Natalizio had testified at the trial to what is contained in his "confession" that might have materially assisted the defense. But further analysis is called for. In sworn testimony on September 6, 1967, at an interrogation by Mr. Newman, the United States Attorney, at which time Natalizio was represented by counsel, and on Septem-

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[9] The defendant also takes the position that by his pre-trial presentation to the government of the fruits of the Miller-Natalizio confrontation the prosecution became obligated to shoulder the entire load of protecting Miller against an erroneous identification. The principle of *Brady* v. *Maryland*, 373 U.S. 83 (1963), cannot be stretched to impose on the prosecution the duty to prepare or present the case for the defendant. See the illuminating opinion of Judge Frankel in *United States* v. *Gleason*, 265 F.Supp. 880 (S.D. N.Y. 1967). See also *United States* v. *Soblen*, 301 F.2d at 242.

ber 12, 1967, before a Grand Jury, he repudiated the truth of the unsworn written confessions plus the affidavit of Lane, the investigator who allegedly heard Natalizio confirm the confession. And he denied that he had ever told Miller that he was involved in the conspiracy for which Miller was convicted. About the written confession, he testified that three armed men stopped him in his car at 3:00 a.m. on July 14, 1967, in North Miami Beach. They took him to two adjoining rooms on the right side of the Sunaqua Motel in Hallendale. They handcuffed one arm and ordered him to write what they told him to or they would kill him. He wrote what they told him to. He denied under oath that what he wrote was true. The affidavit of Mr. Newman discloses that an investigation begun promptly after September 6, 1967, revealed that three men checked into the only two adjoining rooms on the right side of the Sunaqua Motel on July 13, 1967, and paid in advance for three nights. They left on the 14th without asking for a refund. This unusual conduct, coupled with the fact that the person who registered gave the names of his companions at that time as "Mr. Russell" and "Mr. Lewis" which suprised [sic] the sceptical motel clerk because she had the impression that all three were of Italian extraction, served to recall the incident for her. She noted that three men as described by Natalizio did take adjoining rooms on July 13th. Fearing that their hasty departure might have been because of damage to the rooms, another employee entered the rooms and noticed ashes and some burnt paper in the wash basin. A further search of the room disclosed a crumpled sheet of paper on which was written in crude handwriting with misspellings what appeared to be the first of several pages of a confession to a crime, mentioning some location up North, most likely

in New England. Natalizio had stated to Mr. Newman that he wrote four or five different versions of a confession dictated by the men who were referring to some notes they had before they were satisfied with the version that he had written. Perhaps this explains why *two* written confessions,[10] dated July 12th, were sent to Mr. Simons in the same envelope.

Further confirmation of Natalizio's sworn testimony of what happened on the morning of the 14th of July is found in the report of the manager of the apartment where Natalizio lived. He was awakened and asked by Natalizio to be let into his own apartment because he did not have his keys. This incident serves to corroborate Natalizio's testimony that the three men who had him sign a confession at gunpoint retained the keys to his car and apartment after they left him at the motel in the early hours of July 14th.[11]

Natalizio swore that he did not give any true information to Lane, the investigator. While his reasons for agreeing to see and talk with the investigators are a bit confusing, he states that he pretended to cooperate with them because he wanted to learn from them what they knew about other affairs of his related to criminal activities and to get prepared to repay them in kind for the treatment the men who forced him to write the confession had given him. Quite naturally, he associated the investigators with the three men who had forced him to sign the con-

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[10] They are in crude handwriting and contain many misspelled simple words.

[11] An affidavit of Mr. Simons based upon a report of an investigation since the hearing by his investigators takes issue with some of the circumstances of the duress related by Natalizio. These are trivial differences as to details. However, they confirm the fact that the Sunaqua Motel episode did occur.

fession. They did not reveal to Natalizio that they were Simons' investigators.

Looking at the confession only in isolation and not to the manner in which it was obtained will not suffice. Viewing the events as a whole, grave doubt is cast upon the worth of the confession as support for this motion.

In a sense, what is proffered in support of the defendant's motion might be regarded as merely cumulative on the issue of identification. The defendant's evidence at the trial that the Bridgeport contact might have been some other "Frank" was only circumstantial at best. A confession by the true "Frank" would be something quite different. Bearing in mind that in applying the recognized standards to the evidence offered on this motion, the general stricture of Rule 33 that "the court . . . may grant a new trial . . . if required in the interest of justice," I turn to the serious consideration this evidence is entitled to without the limitation that it is merely cumulative. Would it be likely to produce an acquittal?

Admissibility of the Confession

The confessions are hearsay. The orthodox rule is that a statement by a third person against penal interest is not an exception to the hearsay rule, *Donnally* v. *United States*, 228 U.S. 243 (1913), but see the vigorous dissent of Holmes, J., at 277, and the discussion in 5 J. Wigmore, Evidence §§ 1476, 1477 (3d ed. 1940). Model Code of Evidence, rule 509 (1942). This circuit has recently indicated a willingness to re-examine the rule. See *United States* v. *Devico*, 380 F.2d 325 (2d Cir. 1967); *United States* v. *Annunziato*, 293 F.2d 373, 378 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961). Assuming, arguendo, that the exception is recognized, the question remains

whether Natalizio's statements qualify as being truly against penal interest.

"Even a broadened penal interest exception must have some boundaries and must be limited at least to statements admitting a particular crime for which prosecution is possible at the time." *United States* v. *Devico*, 380 F.2d at 327. With Caron's eye-witness identification of Miller so thoroughly tested at the trial, Natalizio would run such a remote risk of prosecution, as to be negligible. This he knew, because Lane, the investigator, conceded in his affidavit that he told Natalizio, "he couldn't be convicted with it." And, when Natalizio asked Miller in Florida on August 6, 1965, "How are they going to indict me and indict you? How can that be done to both of us?" Miller answered, "Let me tell you something. If I beat this case you understand? And I've got everything going for me. I'm as clean and innocent as my son. Follow me? If I beat this case and if this is the same case they're pulling on you, where are they going to go with this case." Natalizio: "I don't know." Miller: "Let's be sensible about this thing." Natalizio: "I don't know." Miller: "Do you think that the man that identified me can turn around and say, oh no, it's not him anymore, it's him. I mean, are you for kidding. You got to walk away from it if it's the same case." [12] At that time, Miller apparently as-

[12] Natalizio denied making any confession at this meeting with Miller. As indicated before, n. 4, I have not passed on the accuracy of the transcript, nor attempted to analyze exactly what Natalizio's end of the conversation meant or what he may have intended it to mean. The government does not concede its accuracy or authenticity. It strikes me as at least curious that Natalizio would have to be forced at gunpoint to sign a confession after Miller had been convicted and lost his appeal, and yet have freely confessed his guilt before Miller went to trial.

sured Natalizio not only that he could never be convicted, but also that he couldn't be indicted for the same apparent offense. If an objective test is applied to determine what is against penal interest some further explication of the confused dialogue between Miller and Natalizio would be necessary to satisfy me insofar as the problem of admissibility is concerned that he made a declaration against penal interest which is referable to this particular case. If the test is subjective, the defendant's brief argues that Miller told Natalizio that he was not going to incriminate him, but merely needed facts about "time" to defend himself. In fact, Miller did not attempt to introduce any evidence at the trial to implicate Natalizio.

In any event, the exception for hearsay against penal interest, like any other hearsay exception, is applicable only in the event of the declarant's death or unavailability. *Cf. Syracuse Eng'r Co.* v. *Haight*, 97 F.2d 573 (2d Cir. 1938). 5 J. Wigmore, Evidence § 1456 (3d ed. 1940). Natalizio was alive and nothing was offered to show that he would not have been available. While on this motion it is not worth tracing the way Natalizio was discovered on the occasions the defense found him, it is apparent that they were able to get in touch with him quite readily.

Credibility of the Confession

On the assumption that Natalizio would be produced to testify at a new trial hearsay objections would vanish. And, by laying aside the fact that such testimony he might give is not newly discovered, consideration of that testimony on the merits would be called for.

The defendant argues that in the administration of criminal justice the search for truth is so encompassing that it would be degrading to such an inquiry to

impose any restrictions upon the grant of a new trial whenever a defendant comes forward with any evidence not offered at the original trial. There is, of couse, more to it than that. To adopt that view without question is to ignore the well establishel principles of law which require recognition of competing considerations.

The broad rule is the same in criminal and civil cases. Of course, there is a difference in presumptions and burden of proof. But in either case the motion is addressed to the discretion of the trial judge. The final test for the granting of a new trial on the basis of newly discovered evidence is whether or not the evidence will "probably produce an acquittal." *Brown* v. *United States*, 333 F.2d 723 (2d Cir. 1964); *United States* v. *On Lee*, 201 F.2d 722, 724 (2d Cir.), *cert. denied*, 345 U.S. 936 (1953); *United States* v. *Rutkin*, 208 F.2d 647 (3d Cir. 1953); *United States* v. *Johnson*, 142 F.2d 588 (7th Cir. 1944), *dismissed*, 323 U.S. 806 (1944); 4 W. Barron, Federal Practice and Procedure § 2282 (Rules ed. 1951); 8 J. Moore, Federal Practice, ¶ 33.03[1] (2d ed. 1966).

The trial judge sits as the thirteenth juror. *Applebaum* v. *United States*, 274 Fed. 43, 46 (7th Cir. 1921). See also 4 W. Barron, Federal Practice and Procedure § 2281 (Rules ed. 1951). He may "utilize the knowledge he gained from presiding at the trial as well as the showing made on the motion." *Brown* v. *United States*, 333 F.2d at 724. The proferred new evidence is not accepted as true; its credibility must be weighed by the trial judge. Thus in *Jones* v. *United States*, 279 F.2d 433, 436 (4th Cir.), *cert. denied sub nom. Princeler* v. *United States*, 364 U.S. 893 (1960), "Where there is a grave question of the credibility of the after-discovered evidence . . . the role of the trial court is that of the fact-finder, so

much so that the Supreme Court has said an appeal from the resolution of the facts should be dismissed as frivolous. [Citing *United States* v. *Johnson*, 327 U.S. 106 (1946).] The Rule has been applied where, as here, a third party confession is the after-discovered evidence upon which the motion for a new trial is found. [citing *Jeffries* v. *United States*, 215 F.2d 225 (9th Cir. 1954); *Connelly* v. *United States*, 271 F.2d 333 (8th Cir. 1959).]"

Although all that has been discussed was only preliminary, yet it had to be stated in order that the complex starting point of this polemic be comprehensible and it allows me to anticipate my conclusions.

Only by taking the written confessions of Natalizio in isolation, divorced from any sworn statements he made can it be argued that the confession is credible. If he is believable at all, it would be more reasonable to believe his testimony under oath. *Cf. DeBinder* v. *United States*, 303 F.2d 203 (D.C. Cir. 1962). To say the least, his credibility is doubtful. Obviously he is a person whom a jury would not believe.

So without again running through the scenes when the two confessions were written by Natalizio in 1967, the whole performance is too lunatic not to awaken the utmost scepticism. Here the defense has submitted two versions of a confession written at the same sitting plus the testimony and affidavit of an investigator to whom Natalizio allegedly confirmed them. The defense did not produce the alleged confessor, although Mr. Newman's affidavit discloses that they had ample opportunity to subpoena him. They claim that motions such as this are usually decided solely on the basis of affidavits. That method is permissible. *United States* v. *Johnson*, 327 U.S. 106 (1946); 8 J. Moore, Federal Practice ¶ 33.03[3] (2d ed. 1966). See also *United States* v. *Troche*, 213 F.

2d 401, 403 (2d Cir. 1954); *United States* v. *On Lee*, 201 F.2d 722.

Natalizio has not sworn to his confession. The hypothesis that his confession was "spontaneous" is so unlikely as to be almost discarded "ab initio." Furthermore, he has repudiated it. He did so twice, once by sworn testimony before the United States Attorney, when he was accompanied by his counsel, and again before the Grand Jury, when he was not. The compulsion to speak the truth may indeed sometimes be induced by ethics, but it rests on a more solid foundation when spoken under the risk of prosecution for perjury. Weighed with those considerations in mind, I am wholly satisfied that the written confessions were obtained by duress. A threat of murder at the point of a gun no doubt is most extreme, but viewed in connection with traffic in narcotics on the scale conducted by this conspiracy, see *Rivard* v. *United States*, 375 F.2d 882 (5th Cir. 1967), it is not unlikely. It easily constituted such duress as to invalidate the confessions. Disbelief of the confessions of Natalizio can be deepened by exploring the testimony at the trial a little further. At the trial Caron not only identified Miller, he also quoted Rivard as saying that the man Frankie to whom delivery had been made in Bridgeport was his friend Frankie and a "hair dresser." The defense now argues that it is unlikely that Rivard would attempt to conceal the identity of Miller from Caron by calling Miller "Frankie" yet reveal it by referring to his occupation. "If Rivard made the statement, therefore it was a lie," they say. Viewing it from the aspect of one person further removed, it would be a most amazing piece of perjury for *Caron* to concoct by himself that James Miller was "Frankie" and a hair dresser. In point of fact, Miller had used the name Frank in con-

nection with earlier criminal activities. His finger prints were on a police record bearing his photograph and the name and signature of Frank—Coppola. And he is a hair dresser, who is the owner and operator of a beauty shop in Milford near Bridgeport, Connecticut. The reference by Rivard to Frankie, the hair dresser, knocks out the hypothesis that it was Natalizio. Natalizio was never known as, never used the name of, and never was called "Frank."

Miller had a fair trial. Despite the prolonged and thorough attack upon Caron's identification of Miller, the jurors were satisfied of his guilt.

The evidence in support of the motion for a new trial is not newly discovered. Even if it would not amount to a circumvention of the rules to disregard that, it is my conclusion that the evidence would not probably produce an acquittal.

The motion for a new trial is denied.

Dated at Hartford, Connecticut, this 20th day of November, 1967.

M. JOSEPH BLUMENFELD
United States District Judge

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In the

Supreme Court of the United States

October Term, 1967

No. 857

JAMES MILLER, a/k/a FRANK JAMES COPPOLA
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

I. *Jury threats*

Since the judge's examination of the jurors who were threatened during the trial, which respondent labels "a full and fair investigation" (Br. 12), was so brief, it is set forth in full below, together with some annotations:

CHAMBERS HEARING

JUNE 1, 1966

(Tr. Vol. XVIII)

The COURT. Mr. Lester, Mr. Parsons and Mr. Baldwin are present. I think it was early last week that it came to my attention through one of you and the Clerk Mr. Markowski, to whom

one of you spoke, that someone at the dinner party had made a remark to Mr. Lester, repeated a rumor that he had heard in Torrington, is that right, Mr. Lester?

Juror LESTER. That's right.

The COURT. Something to the effect that — well, suppose you tell me what it was?

Juror LESTER. Well, do you want the names?

The COURT. No, I'm not too concerned about the names of who told you, but what was said. First, what was said that caused you some concern at the time about this case?

Juror LESTER. Well, in the first place, I happened to be a Warden in the Borough of Litchfield and there are always people that talk to you about these things, and some of the ordinances, and so forth. In Litchfield, if they don't like something, we get some nasty remarks. This was at a party, and a fellow that I know very well and was serving the drinks there — I have forgotten how it came up — well, everybody knows that we are on the jury over there in Litchfield. We don't say anything. But he said, "I'm just going to warn you that another man here in Litchfield told me that" — he put it this way, "When this is over" — he was talking about this trial — "that unless you're very careful" — and I believe that's the way he put it — "that there is a bunch in Torrington who are going to get after you and beat you up." He said, "They don't want to kill you, but they don't like what is going on."[1]

That's as near as I can recall the way he put it.

The COURT. You then told Mr. Baldwin?

Juror LESTER. Yes. We drive over together.

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[1] The judge never ascertained from the jurors whether they interpreted the remarks as a threat against acquittal or conviction.

The COURT. And Mr. Parsons knows about it, you are all from the same area, you travel over together.

Now, the question is whether or not this statement and these circumstances have intimidated you or will have any effect upon you to decide the case on the evidence and that you are free from prejudice and fear of any kind.

Now, before I ask you to answer that it is possible — I mean this can be a subtle thing. It may be a rumor that is just loose talk, but it might be designed, if it is designed, to reach your ears. It might be to make you stiffen up and say, "No one is going to intimidate me."

On the other hand, it may be to intimidate you. I don't know what it was designed to do.[3] But the question is whether or not, in the face of that remark and those circumstances of which you are aware you feel in your own mind that it will have no effect whatsoever upon your decision in reaching a verdict in the case?[4]

Juror PARSONS. No.[5]

Juror BALDWIN. No.

Juror LESTER. Not a particle.

The COURT. Does anybody else in the jury know about this?

Juror BALDWIN. No.

Juror PARSONS. No.

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[3] The judge had no idea what the threat was designed to do and never permitted the jurors to express theirs.

[4] One of many leading questions which a lawyer would not have been permitted to ask.

[5] What does the answer "No" mean to a question, "whether or not"? The judge didn't inquire.

Juror LESTER. Absolutely not. I believe you should mention something about that place over there.[5]

Juror PARSONS. You have two locations in Torrington that have not a very good reputation. I don't know if "reputation" is the correct word, but I have heard it. I have grandsons and one is 20 and one is 16 and they get around and they mentioned back awhile that out around the Dunkin Donut, which is a 24-hour deal in the shopping center there is dope being peddled around there.

The COURT. Where?

Mr. PARSONS. Around Dunkin Donut in Torrington in the shopping center. And, of course, the Litchfield Farm Shop up on East Elm Street is in the same location as the First National which is kind of a shopping center and it is getting to be quite a place also where they hang around. So those are two places.

The COURT. What you are saying is that it may not be just a kidding rumor, somebody may have talked?[6]

Mr. LESTER. No, I don't think so.

Mr. PARSONS. No, sir. Possibly, but that doesn't affect me any, only to the extent that I have grandsons, and so forth.[7]

The COURT. Well, this is not going to prejudice you in deciding the case?[8]

Mr. PARSONS. No, but what Mr. Lester referred to, we had

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[5] Shows that a least two of the jurors have been discussing "that place over there" and strongly suggests that they see a connection between "that place" and the threats.

[6] This question and its answer are meaningless. The jurors were never asked what connection, if any, they saw between the dope peddlers in Torrington and the "bunch in Torrington" that was going to beat them up. Had there been a question, the answer is obvious.

[7] The juror's concern for his grandsons was ignored by the judge.

[8] Another leading question, to which there could be only one answer, and which also tried to change the subject.

talked a little about it and I know of these two places where there is a great possibility that this stuff might be handled, if you want to put it that way. That's all there is to it.[9]

The COURT. But that has nothing to do with the case so far as we know?[10]

Mr. LESTER. No.

Mr. BALDWIN. No, he just mentioned that.

The COURT. Well, the thing I am most concerned about in this case, naturally, is that we have spent five weeks on it and I don't want to see it go down the drain because some juror is either fearful or deciding it honestly and according to his conscience or because he is going to stiffen up and say, "Well, nobody is going to push me around," and then decide it on the basis of some consideration of that kind, but decide it fairly.[11]

Mr. PARSONS. It has nothing to do with me. I will say it the way I see it.

The COURT. All right.

(Whereupon the jurors returned to the jury room.)

After the above inquiry,[12] the judge impounded the transcript and denied the defense's motion for a mistrial (1456a). It was not until September 26, 1966, almost four months after

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[9] The juror did not immediately get his cue and attempted again to tell the judge something.

[10] This time, the judge made it plain that there was to be no more discussion of dope peddlers or grandsons.

[11] Could any juror have resisted this pressure, especially a juror who is cognizant of the fact that a mistrial would be necessary only because he violated instructions and discussed the case out of court?

[12] Respondent's claim that defense counsel suggested that no counsel be present during the judge's inquiry (Br. 10) is incorrect. The judge suggested it himself (1384a). Respondent also errs in suggesting that

the trial, that the transcript was released and the defense apprised of the nature of the threat, the content of the court's examination of the jurors, and the fact that, contrary to the court's promise, it had examined the three jurors together. And although efforts by the defense to investigate had been prevented by the judge's post-trial instruction to the jurors not to discuss the matter with the defense, the judge declined to give the defense a two-week postponement in which to investigate, denying the motion for a new trial on the same day that the transcript was disclosed.

Despite respondent's characterization of the threats as "cocktail party gossip (Br. 12), the record fails entirely to establish that the jurors so regarded the remarks and that they did not attribute the remarks to the defendant. The Government failed to meet its burden to establish, on the record, that the improper communications were harmless to the defendant, as required by *Remmer v. United States*, 350 U.S. 377, 379. Indeed, the record shows that the threats were highly prejudicial.[11]

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there was an express waiver by the petitioner of his right to be present at the judge's inquiry of the jurors (Br. n. 10). The waiver was only of the right to be present at a conference between the court and counsel regarding procedure (1382a). Moreover, the record does not support respondent's claim that defense counsel asked the judge to conduct an inquiry to "determine the effect of the threat upon the partiality of the jurors involved" (Br. 10). Rather, the defense agreed that the court should make its own inquiry into the nature and extent of the improper communication (1383a-1391a). In any event, the defense expressly demanded the right to have all the information at the conclusion of the trial and to investigate the matter itself (1386a). The defense also insisted, and obtained the court's agreement, that the jurors would be interviewed individually (1388a). All these stipulations and reservations were later disregarded by the court.

[11] Despite, if not to some extent because of, the judge's inquiry, the threats were prejudicial to the defendant in at last two ways: (1) Because the jurors attributed the threats to dope peddlers, this removed

In arguing to the Court of Appeals about the effect of the threats on the minds of the jury, Government counsel expressly went outside the record to inform the court that the Government had investigated the matter and ascertained that the remarks were harmless cocktail party gossip. In view of this representation, which presumably influenced the court below, petitioner feels entitled to refer to the results of his own investigation, undertaken after the petition for certiorari was filed (and disclosed to the Solicitor General by letter January 5, 1968). That investigation (See affidavit of Virginia Samon included as an appendix to this brief) shows that: (1) no representative of the United States Government made any post-trial inquiry of the jurors in question regarding the threats; (2) the jurors were so frightened by the threats that one carried a shotgun around his home and all three sought and obtained police protection during the trial, which fact they did not reveal to the judge; (3) the two jurors who attempted to tell the judge about the dope peddlers in Torrington thought that the threats had come from that source, which they associated with the defendant. In short, had the Government conducted the investigation which it said it had, it would have found the facts to be precisely those which fairly shriek from the record itself.

II. *The alias and the arrest record*

(a) Respondent's assertion that "Prior to trial, the government informed the court that petitioner's true name was James

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all doubt in their minds that the defendant was guilty; (2) The jurors understood the judge's principal concern to be whether they would, out of fear, acquit the accused. Having naturally denied that they would do so, there was only one way in which they could clearly prove their denials: convict the defendant. Whatever they consciously entertained or succumbed to this temptation is impossible to know and is beside the point.

Miller and that Coppola was the alias" (Br. 7) has no support in the record. Moreover, there is nothing in the record to show that the *jury* was *ever* told that the Government conceded that its indictment was in error regarding the name of the defendant.

(b) The Government denies that petitioner was tried under a phony alias and says that the "alias [James Miller or Frank Coppola?] was an essential part of the government's case" (Br. 8). Yet respondent fails to deal with the point that the Government never introduced in its case-in-chief an iota of evidence that James Miller had ever used or been known as "Frank," "Frank Coppola," or "Frank James Coppola." Instead, it seeks to justify the indictment by the fact that the defendant claimed he was not Frank James Coppola but James Miller. Yet the defense was forced into this stance by the phony indictment. What the Government seeks to sustain, therefore, is an erroneous and inflammatory alias allegation made relevant only by the defense's inevitable efforts to deny it, which efforts would have been unnecessary had the court granted defendant's unquestionably meritorious motion to strike "Frank James Coppola" from the indictment at the conclusion of the Government's case.

(c) Respondent offers not the slightest justification for the introduction, on rebuttal, of the eighteen-year-old arrest record.

(d) The Government also fails to explain how the arrest record could have been admitted, assuming that it was otherwise probative, without revoking the rule which excludes hearsay evidence (See Pet. 16).

III. *Penalties for failure to testify*

Respondent attempts to justify the court's instruction to the jury that it could convict the defendant of the crime charged "unless the defendant explains the possession to the satisfaction of the jury" by showing that the court also told the jury that the prosecution has to prove its case beyond a reasonable doubt (Br. 18). Yet if the latter instruction would legitimatize the contradictory charge that the defendant's failure to explain may be taken into account, then *Griffin v. California,* 380 U.S. 609, should have been decided otherwise, for the jury in that case was similarly instructed. See *Id.* at 621 (dissenting opinion). Nor does the fact that the court told the jury that the defendant "in the exercise of constitutional rights . . . need not testify" cure the comment. The jury in *Griffin* was told the same thing. *Id* at 610.

Respondent argues that the "sole function served by the instruction on the statutory presumption was to allow the jury to infer that petitioner had knowledge of the illegal importation" (Br. 19). Yet that wasn't what the jury was told. In any event, it defies reality to suppose that a jury would have so understood the instruction even had it been so explained.

Even if the instruction complained of had not itself been a penalty for failure to testify, it would be when combined with the fact that the countervailing no-inference instruction was delayed until the jury had deliberated twenty minutes, and when the Government was permitted, by introducing the arrest record on rebuttal, indirectly to imply that the reason for the defendant's failure to explain was a criminal past. When all these errors are combined in one case, nothing significant remains of the defendant's Fifth Amendment rights.

IV. *Destruction and suppression of evidence*

(a) The Caron vehicle, which was delivered to Bridgeport Frank three weeks before Caron's arrest, was condemned and put into daily use months before the defendant was arrested (100a). Despite this fact, respondent implies that the defense waived its right to complain of the destruction of the evidence because it didn't demand to inspect the car until three months after defendant's arrest (Br. 13). This is absurd. Had the defense demanded to see the vehicle and to submit it to scientific examination to determine the identity of "Frank" on the day of the defendant's arrest, the demand would have been a useless gesture.

Respondent also suggests that the defense's desire to submit the car to fingerprint and other residue examinations for the purpose of determining the identity of the man at Bridgeport is an afterthought (Br. 13). Yet the record refutes this, for the defense expressly complained of the inability to make "scientific examinations, fingerprint examinations . . . and other . . . examinations" of the car in one of the many pre-trial motions which were summarily denied (101a).

(b) Regarding petitioner's complaint that the Caron children were hidden by the Government and never made available for an interview, respondent relies upon the alleged right of a witness to refuse to be interviewed. Yet the witnesses did not refuse to be interviewed and defense counsel never was permitted an opportunity to ask them if they would submit. Instead, Caron's wife and co-conspirator was awarded the absolute right to make the decision. What respondent ignores, in addition to the unfairness and artificiality of the approach

below, is the fact that Mrs. Caron was in a position to cut off the defense's access to the children only because the United States Government was hiding them. They were, for all practical purposes, in Federal custody.

Respondent adds the conjecture that the children wouldn't have helped the defense very much anyway, pointing out that they only saw "Frank" briefly (Br. 15, 16). Yet Mr. and Mrs. Caron, upon whose testimony defendant was convicted, also saw "Frank" only briefly. Their testimony is enough to send petitioner to prison for twelve years but that of their children (undoubtedly less corrupt and with less of a stake in the outcome than the parents) wasn't worth even being made available to the defense!

Respondent cannot seriously deny that a defendant, as a corrolary to his right to compulsory process, is entitled to interview witnesses before calling them, and that the court has authority to compel witnesses to submit to an interview. See *State v. Butler*, 27 N.J. 560, 143 A. 2d 530; *People v. Cordero*, 72 Cal. App. 526, 237 Pac. 786; *Wilson v. State*, 93 Ga. App. 229, 91 S.E. 2d 201.

(c) Caron falsely denied on the stand that he had been promised a pardon for his testimony. The trial judge told the jury in effect that there had been no evidence that Caron had been promised a pardon (See Pet. 23). Yet respondent defends the court's refusal to compel production of Caron's pardon applications, his letter regarding the pardon written to the Attorney General, applications and communications with the Immigration and Naturalization Service, and other statements by Caron, on the ground that he admitted *applying* for a pardon

and other officials admitted that they would support his application (Br. 17). (It was these officials whom the court told the jury had "no authority whatsoever" to obtain a pardon for the defendant). As it turned out, therefore, Caron's two and one-half years of garrulous captivity produced only a single statement written by him which was made available to the defense (the defense had a witness to swear to the statement anyway). That was Caron's letter to his wife, written two months before the trial, in which he stated, "At the next trial I am going to speak honestly and say that I lied in all my testimony, and that I do not know Frank" (766a-776a).

The defense was entitled to any prior statements of Caron which related to his expectations of a pardon, since they would tend to prove the falsity of his denial that he had been promised (or believed he had been promised) a pardon. As indicated by the judge's charge, the pardon issue was a critical part of the defense's attack on the witness, and the Government's failure to disclose a single statement relating thereto permitted Caron to foist a piece of perjury on the jury.

V. *Fundamental unfairness*

(a) Illegal surveillance.

Although it neither asserts that it has investigated the matters nor forthrightly denies that illegal surveillance was employed in this case, the Government labels petitioner's complaint as "unsubstantiated" (Br. n. 15). And indeed it is unsubstantiated, if for no other reason than that petitioner was never afforded the opportunity to produce evidence on the matter. At the hearing on the motion to suppress which is alluded to in the

Government's brief (n. 15), the defense had subpoenaed federal and state officials, and their surveillance records, but the court declined to take any evidence. Thereafter, the claims were renewed in Texas with the same result: summary denial without hearing.

Agents Fallon and Cozzi, in affidavits executed July 21, 1964, denied "wiretapping" (Tr. 2180, 3797-3805), though it was illegal surveillance and not wiretapping which had been alleged. Moreover, although one of the agents directly involved in the investigation of the case was the same Finbarr Murphy who planted a radio in an informer's car and overheard conversations of a defendant already under indictment, *Massiah v. United States,* 377 U.S. 201, his affidavit was not submitted. Furthermore, although Connecticut State Police officers Demlong and Maroney conducted surveillance of the defendant at the request of customs agents from November, 1963 until at least June, 1964 (1183a, 1187a), neither, so far as the record shows, has ever been asked if he conducted electronic eavesdropping or wiretapping.

Since it has recently become plain that federal agents regularly engaged in illegal surveillance during the 1963-1964 period, see Westin, *Privacy and Freedom,* 121-126 (1967) and often relied upon state police to do it for them, see *Id.* at 127-132, and since it is hard to imagine a case in which such surveillance would be more tempting to investigative agents than this one, the Government's consistently cavalier treatment of petitioner's allegations, and its failure in this Court even to assert that it has investigated the matter, does not comport with the Government's obligations under recent decisions of this Court. *Kolod v. United States,* 36 LW 3306 (1/29/68); *Black v. United States,* 385 U.S. 26; *O'Brien v. United States,* 386 U.S. 345.

(b) The identification process.

In *United States v. Wade*, 388 U.S. 218, this Court essayed the weaknesses and dangers of eyewitness identification and noted that the critical stage of the identification may occur at the lineup. In this case, there wasn't even a lineup when Caron selected the defendant. Caron came to identify the petitioner through a lengthy and basically unreconstructible process of interrogation, negotiation, picture exhibition and surreptitious observation, a procedure which makes the lineup seem foolproof by comparison. Caron had almost every conceivable inducement to identify a "Frank," and his memory mingled and confused images of photographs and faces so that his identification of the defendant five months after he began looking at photographs was virtually inevitable, whether defendant was guilty or innocent. *Cf*, Williams, *The Proof of Guilt*, 119-120 (3d ed. 1963).

(c) The means of meeting the misidentification.

If the Government ought ever to convict a person of a serious crime upon testimony like that used below, fundamental fairness requires that the accused be given every opportunity to prove the identification a mistake. Unlike the suspect selected from a lineup, petitioner and others similarly identified have virtually no way of exposing defects in the identification procedures. If the jury does not believe the alibi (petitioner had one of the strongest alibi defenses ever laid before a court), the defendant must prove who actually committed the crime. In this case, however, two of the most likely sources of evidence as to who committed the offense were denied the petitioner: the Caron vehicle in a preserved condition and the registration records of the Bridgeport Motor Inn (withheld from the defense until two years after the event when, as sources of wit-

nesses, they were worthless). Deprived of this evidence and severely handicapped by the delay of ten months between the crime and his arrest, petitioner's efforts to prepare a defense were crippled by the press stories planted by Government agents. These garish, inflated, false accounts so inflamed the community that petitioner's business was virtually destroyed and almost every potential source of evidence shunned him and his counsel. Relief from these oppressive conditions was repeatedly sought from the courts. Had some respite been granted,[*] petitioner might have been able, despite destruction and suppression of evidence by the Government, to obtain evidence sufficient for an acquittal. Instead, all relief was summarily denied without hearing.

* * *

Although petitioner has not undertaken to point out many respects in which his interpretation of the record differs from that of the respondent, there is one assertion which cannot go unchallenged. Respondent concludes its brief by asserting that the defense attempted at trial "to show that the person who received narcotics from Caron in Bridgeport was Frank Lucion . . . Mancuso . . . Frank Piccolo . . . or Frank Musial" (Br. 21). As respondent is well aware, the defense has never claimed that the man who committed the crime was anyone other than Mario Natalizio (See affidavit of Mr. Simons, submitted with motion to Court of Appeals to postpone decision on rehearing). No claim was ever made that any of the other individuals actually committed the offense.

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[*] As by compelling the Government to correct its announcement that the defendant was the number one figure in the largest narcotics ring ever captured, that he "masqueraded as a legitimate businessman," that he was not James Miller but "Frank James Coppola, a 37-year-old ex-convict," etc. See 102a-111a, 218a-245a.

Caron was asked on cross-examination if he hadn't held up eight to ten trucks with a man named Frank Lucien (579a). Frank Mancuso's[15] name came into the case because Caron had stated on October 21, 1963 (eleven days after his arrest, thirty days after his last delivery to Bridgeport Frank), "I am fairly sure that those photos [of Mancuso] are the man we have referred to as Frank, who was the contact man in Bridgeport, Connecticut, to receive narcotics on August 21st and September 21st," his "only reservation" being that "the subject is somewhat heavy to be Frank" (1150a). Frank Piccolo's name got into the case through a report of customs agent Fallon wherein it was stated that Caron, before identifying Miller, had identified a "Frank Piccolo" (1198a). The defense offered Frank Musial as proof that there were local hairdressers named Frank who were not the defendant.[16] All this was evidence that Caron's identification of petitioner was worthless; it was not evidence that each of these men had committed the crime.

Respectfully submitted,

STEVEN B. DUKE
W. PAUL FLYNN
RICHARD H. SIMONS
Counsel for Petitioner

February, 1968

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[15] Respondent denies that Mancuso was known as "Frank" (Br. n. 13), yet the Government's own witness, agent Fenelon Richards, referred to him as "Frank Mancuso" (1148a, 1149a).

[16] The defense was forced into this position by Caron's perjurious testimony that Rivard, his Canadian boss, had told him that "Frank" was a hairdresser. This shocking piece of testimony never appeared in any of Caron's descriptions or references made to Government agents and recorded in their reports. Apparently, the Government would have us believe that after two years of unsuccessfully trying to recall something Rivard said about the Bridgeport man, Caron suddenly remembered that the Bridgeport man was said to be a hairdresser.

APPENDIX

AFFIDAVIT

The undersigned, having been duly sworn, deposes and says:

I, Virginia Samon, am a private investigator with the Diamond Detective Agency, Eleven Beacon Street, Boston, Massachusetts.

On December 2, 1967, a trip was made to the home of Clarence D. Baldwin, Cape Dutton Road, Litchfield, Connecticut. I arrived at approximately 1:05 P.M., at which time Mr. Baldwin drove into his yard in a company car (CP&L). I approached him and properly identified myself as an investigator for the defense, explaining that I would like to ask him two questions relating to the trial of the United States vs. James Miller, as I understood that he had served as a juror on the case. Mr. Baldwin immediately stated that he did not wish to discuss this matter at all. When I asked him what his reason was, he replied that he was told by the judge never to say anything to anyone about the case. I asked him how long ago the judge had given this order and he said that it was about a year ago. He further stated that it was a long, involved story and he really didn't want to go into it. I agreed that this was so, but explained that I only wished to ask him two questions. At this point, Mr. Baldwin's wife came to the door and asked Mr. Baldwin to invite me into the house. Mr. Baldwin then said that I could come into his home if I wished, but that it wasn't necessary since he would not talk about the case. He explained that he did not want to appear rude, but he really had no choice in the matter. He advised me that all the jurors had been given the same warning and that none of them would ever talk. In fact, Mr. Baldwin pointed out that one of the jurors, a Mr. Lester, was so upset by the trial that he is not

the same man today as a result of all the stress and strain. Just shortly after the trial, Mr. Lester suffered a cerebral hemorrhage, which Mr. Baldwin attributes to the force of the trial. He continued to say that the trial was a terrible ordeal for all the jurors involved. One of the jurors was shingling his house and he kept a shotgun with him all the while. I asked Mr. Baldwin if he was inferring that this juror was frightened that much by the threats. Mr. Baldwin said that was correct. He said that everyone was scared. "It didn't bother me that much," he said, "but I was afraid for my family. You know — I have three children and a wife. I didn't want anything to happen to them. Now that it's all over I just want to forget it. It's over and done with!"

Mr. Baldwin said that he was sorry that he couldn't be of any help to me. I told him that I understood his position and thanked him just the same.

A trip was then made to the home of Mr. Levi E. Parsons, Sr., West Shore Road, Bantam, Connecticut. I arrived at approximately 2:00 P.M. At this time, Mr. Parsons had just pulled into his driveway. When I properly introduced myself to Mr. Parsons, he stood back and said that would not speak to me. He stated very strongly, "I don't have a thing to say. That's all!" Then as he walked towards his house he muttered, "It's all over now."

On this same date, a trip was made to the home of Mr. Joseph William Lester, South Street, Litchfield, Connecticut. I explained to Mr. Lester, as I had to the others, that I wished to ask him a couple of questions about the trial. He agreed to discuss it with me and invited me into his home. I asked Mr. Lester the following two questions: 1) How were the threats communicated to you? 2) What effect did they have?

Mr. Lester answered these questions and also volunteered other information as a result of our conversation. From this discussion, the following statements were made by Mr. Lester:

"I was attending a dinner party and an individual mentioned to me that some people had said . . . Well, you know the story. It's all in the record."

"I did mention it to the two jurors with whom I rode to the courthouse [Baldwin and Parsons]. We decided that it should be told to the judge."

"I wasn't that scared; I had no reason to be. But the others have families. I did discuss it with my wife, however."

"All the jurors knew about it [the threat], but not much was said. The judge asked us not to discuss it."

"I don't know what the other jurors thought about the threat, but . . ." At this point, Mrs. Lester interrupted her husband and said to him, "Dear, you do mean just the other *two* jurors, don't you? You don't know whether *all* the jurors knew about the threat." Mr. Lester replied, "No, dear, they *all* knew about it. Why, sure . . ." Mrs. Lester again interrupted, "Don't you remember that the judge instructed you not to mention it to the other jurors? You never said anything to them about it." (Mrs. Lester kept shaking her head as she made the above statement.) Mr. Lester said, "No, I didn't say anything — but they knew."

On December 4, 1967, a check was made at the Litchfield State Police Headquarters in Litchfield, Connecticut, to determine if they had any record of either Baldwin, Lester or Parsons making a request for police protection in either May or June of 1966. Trooper Swantko checked his files and said that he had no such request on record.

A trip was then made to the Litchfield Town Hall, where Mr. Flaherty, the resident trooper, has his office. I properly identified myself and asked him if he might have a record of the request, as described above. Trooper Flaherty immediately knew what I was referring to and he recalled, in detail, that Mr. Baldwin had told him about the threat and had come to him for advice as to what he should do to protect himself. Mr. Baldwin had asked him to check his house often and to make note of any strange cars in the area. Trooper Flaherty agreed to do this. Flaherty explained to me that, at the time, he treated the situation in a matter-of-fact manner and tried not to cause any further alarm for Mr. Baldwin. Mr. Baldwin had expressed his concern to Trooper Flaherty and indicated that the others were more afraid than he was. Trooper Flaherty stated to me: "If I remember correctly, that Mr. Lester was really upset about the threat!"

Trooper Flaherty also stated that he had never been questioned about the threat by any representative of the Federal Government or anyone else, at any time.

On December 17, 1967, I returned to the home of Mr. Lester and asked him some more questions about the threats. I referred to the record of the colloquy between the three jurors and the judge and the place where Mr. Parsons, at the urging of Mr. Lester, told the judge about "dope" being "peddled" at two places in Torrington. I asked him why he thought to mention this matter to the judge during an interrogation about the threat. He replied that he and Parsons believed that the threats came from dope peddlers in Torrington, whom they associated with Mr. Miller.

I asked him if he had ever discussed the threats with any representative of the United States Government since hearing

of them, either during or after the trial. He replied that he had not done so, and no one from the Federal Government had ever asked him for the identity of the person who related the threat to him.

I asked him what he thought that the judge meant when he asked Mr. Lester and the other jurors if the threats would affect their decision in any way. He replied that he understood the judge to be inquiring about whether their decisions would be affected by fear of retaliation.

Mr. Lester was then asked if he had ever sought police protection as a result of the threats. He said yes. He, Baldwin and Parsons had gone to Trooper Flaherty and requested police protection the day after the threats were related, before they talked to the judge.

Mr. Lester stated that both Mr. Baldwin and Mr. Parsons were scared by the threats — especially Mr. Parsons who was "terribly shaken." He said that both Parsons and Baldwin were definitely affected and influenced in their decision by the threats, while he was not because his children are grown and "What have we to lose? There's just the two of us."

On the same date, I returned to the home of Mr. Parsons. Again he refused to discuss the threats. Indeed, he asked me to leave immediately and appeared frightened. I left immediately.

I returned to the home of Mr. Baldwin on December 17, 1967. He was very angry as soon as he saw me and told me to "get out of here right now." He also said that he was going to call the other jurors and tell them not to discuss the case with me because the judge had ordered them not to do so. I told him that I had already asked some of the jurors about the threats.

A while later, when I and the man who was accompanying me were eating lunch, Mr. and Mrs. Baldwin came into the restaurant. Mrs. Baldwin apologized for her husband's outburst, and told me that they would check with the judge and then, if approved, would discuss the case with me. I gave her my name and she gave me her telephone number, suggesting that I call them back in a few days, which I agreed to do. I thereafter called several times and received no answer.

Signed and sworn this twenty-seventh day of December, 1967

Virginia Samon

WITNESSES:

Richard B. Lane
Marilyn Babbitt

On this twenty-seventh day of December, 1967, personally appeared before me Virginia Samon and swore to the truth of the matters contained in the previous statement of six pages which is herewith attached.

SHIRLEY P. BRILL
Notary Public

My commission expires
January 28, 1972

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In the

Supreme Court of the United States

October Term, 1967

No. 857

JAMES MILLER, a/k/a FRANK JAMES COPPOLA
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITIONER'S SUPPLEMENTAL MEMORANDUM

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SUPPLEMENTAL MEMORANDUM

In the first question presented in the Petition for Certiorari in the above entitled case -- relating to threats made to three members of the jury during the trial -- petitioner urged this Court summarily to reverse the case for a new trial. Since it might possibly appear preferable to some members of the Court to remand for a hearing on the full facts and circumstances regarding the threats, petitioner believes that

the Court should be informed of developments which have occurred relative to this issue in the District Court since the petition was filed. These developments leave no doubt that a reversal for a new trial is the only feasible, appropriate, or just remedy.

* * * *

As soon as he learned that the defense had finally obtained interviews of the Miller jurors about the threats that were made to them, the District Judge who presided at the trial and whose judgment is sought to be reviewed in this petition ordered the United States Attorney to conduct an investigation of the defense's investigation. Counsel were notified of the investigation and asked to respond on December 20, 1967. They immediately discontinued their investigation and responded to the courts.

On February 5, 1968, the judge issued an order to show cause why the defendant, his counsel, and all others acting on his behalf should not be enjoined from contacting the Miller jurors in any way. The defense then requested permission to subpoena three

of the jurors to the hearing but the court "declined to act on the motion."

The hearing was held on March 4, 1968. On March 28, 1968, the District Judge issued an order enjoining the defendant, his counsel; and all acting on behalf of the defendant "from making any inquiry of any of the jurors who comprised the petit jury . . ." The court's opinion (attached as an appendix hereto) and the record of the hearing (certified to and lodged with the clerk of this Court), are submitted to the Court so that it may get the full picture of the bewildering frustrations encountered by defense counsel in their efforts to get justice for James Miller.

At the hearing, one of defense counsel testified about his direction of an investigation of the jurors, stating that his objective at the outset of the investigation was to gather information with which to prove the fact that "improper communications to the jurors . . . contaminated the trial and deprived [his] client of an impartial trial by jury and the right to

confront witnesses." (R. 24). He further stated that he was interested in learning from the jurors the truth of the Government's representation to the court of appeals that it had investigated the threats and found harmless cocktail party gossip (R. 25, 51), and whether the judge had ordered some of the jurors not to discuss the threats with representatives of the defense (R. 35). At the request of the judge, he submitted copies of written instructions (in questionnaire form) that he had given the investigator (R. 27). These forms were admitted into evidence at the behest of the defendants. (R. 80).

Counsel also testified that the investigator, Miss Samon, learned early in the investigation that the jurors during the trial had discussed the threats with a state trooper, a fact which hadn't been disclosed to the judge. (R. 37). Counsel also testified that he personally corroborated the discussion with the trooper. (Id.). The court said that it wasn't interested in hearing about the discussions between

the jurors and the state trooper (Id). When the attorney for petitioner's counsel explained that he was trying to show that further investigation was warranted because of the discovery of improper communications in addition to the threats which were disclosed at trial, the judge said that he wasn't concerned with that (R. 38, 39). The judge's view was that the Court of Appeals had said that he had adequately examined the jurors during the trial and that should have been the end of the matter (R. 40). When reminded that there were improper communications about which even he and the Court of Appeals had been uninformed, the judge called that "quite beside the point." (R. 41). He implied that any interviewing of jurors after the fact, for any reason, regardless of circumstances, was illegal, and asked for authority to the contrary. (R. 43). He got it: Opinion 319 of the Committee on Professional Ethics of the American Bar Association (R. 44), and Parker v. Gladden, 385

U.S. 363. He was also informed that the Government had stated in oral argument to the Court of Appeals that the defense was free to investigate (R. 51), and had said in footnote 9 of its brief in the Court of Appeals that the defense had not been denied permission to investigate but, on the contrary, "ever since the hearing on September 26, 1966, counsel has been free to pursue the matter and seek to present to the trial court any new facts not previously disclosed by the court's own inquiry." (Defense exhibit 1, R. 54).

The investigator also testified. She stated that her affidavit (the one attached to Petitioner's reply brief in this Court) was true. She further testified, in amplification of her affidavit, that jurors told her that they had associated the threats with dope peddlers in Torrington (the jurors' neighboring town) whom they associated with the defendant (R. 68), and that this had influenced their decision in the case (Id.). Other jurors also said that they had heard that defense counsel was being paid $45,000 per week for the trial and they concluded that no innocent man could afford to pay an attorney that much (R. 67, 68). At this

point in the proceedings, the judge refused to hear any more (R. 69-71). Counsel then offered to prove that one of the jurors had said that all the jurors knew of the threat (R. 71); that the state trooper had told Miss Samon that in his discussions with the jurors (during trial) he "indicated that the probable source of the threat to Mr. Lester was the dope peddlers in Torrington . . ." (R. 72).

No evidence of any harassment or any improper treatment of the jurors in the course of the investigation was offered. All the evidence was to the contrary.

An extensive brief was submitted to the court by counsel for the defendants. The brief cited case upon case which clearly establish that the defendant's jury was unconstitutionally contaminated by the improper communications that were made to it: e.g., Mattox v. United States, 146 U.S. 140 (newspaper accounts that defendant had committed other crimes); Chambers v. United States, 237 F.2d 573 (8th Cir. 1916) (statement by deputy marshall about probable penalty upon conviction);

Holmes v. United States, 284 F.2d 716 (4th Cir. 1960) (statement by deputy marshall that one of the defendants was presently incarcerated on a prior conviction; newspaper account to same effect); Remmer v. United States, 350 U.S. 377 (someone asked a juror if he wanted to make some money; F.B.I. agent asked the juror about the matter); United States v. Kum Seng Seo, 300 F.2d 623 (3d Cir. 1962) (newspaper article read by jurors reported that defendant's bond had been set at $100,000 and that the heroin had been found in her room). Marshall v. United States, 360 U.S. 310 (newspaper account read by jurors reported two prior felony convictions); Parker v. Gladden, 385 U.S. 363 (bailiff expressed opinion that defendant was guilty). It was thus made clear that the jury in this case was more thoroughly and more poisonously contaminated than any jury in any case ever considered in a federal appellate court. (Despite the fact that the defense had been frustrated in its attempts to interview most of the

jurors).[1]

The court was also informed that counsel had located only one case in which the right of counsel to interview jurors to obtain evidence of contamination had even been questioned by a judge. In that case the trial judge who questioned the practice was reversed. Holmes v. United States, supra, reversing 183 F.Supp. 361 (E.D. So. Car., 1960).

The opinion of the American Bar's Committee on Professional Ethics, Opinion 319 (August 26, 1967), was introduced into evidencebelow. That opinion states, "Certainly, as to [jurisdictions] in which the testimony and affidavits of jurors may be received in support of or against the motion for a new trial, a lawyer in his obligation to protect his client must have the tools for ascertaining whether or not grounds for a new trial exist, and it is not unethical for him to talk to and question jurors."

1. Only six or seven of the jurors were interviewed before the court began its investigation (R. 32). Some of these were reluctant to discuss the threats because of fear (Id.), and others because of a belief that the judge had ordered them not to (R. 35).

With that factual and legal background -- a clear constitutional right to investigate and to produce evidence; enough evidence already gathered to justify a new trial several times over -- the judge below issued an order enjoining any investigation. Absent from what might appear to the uninformed as a relatively thoughtful and dispassionate opinion was any reference to A.B.A. Opinion 319 or to the dozen or more decisions holding the evidence sought both admissible and sufficient for a new trial. Absent also was any authority supporting the injunction.

In building a scaffold for his unprecedented injunction, the judge first lays down that no juror may be asked whether a threat or other improper communication influenced him (although the same judge, in this very case, had asked three of the jurors if the threats "will have no effect whatsoever upon your decision in reaching a verdict in the case." (Petitioner's Reply Brief, p. 3)). Upon this shaky foundation, he piles a series of platitudes about the sanctity of jury deliberations and comes up with the entirely novel decision that defense counsel are

never permitted to make any post-verdict inquiries of jurors for any purpose.

Quoting out of context a section of defendants' brief, in which it was acknowledged that jury deliberations and votes on the merits are generally immune from inquiry, the court implies that the defense virtually conceded that it was in error in seeking to obtain corroborating evidence of jury contamination. Omitted from the opinion was any reference to, or consideration of, the following argument from the brief, which completes the context:

> "Permitting impeachment by evidence of improper influence, however, tends to protect juries from such influence because losing parties are motivated to expose such influences and thus all parties, as well as the courts, learn of their existence and guard against them in the future. Moreover, if, as our system fundamentally assumes, potentially prejudicial influences upon juries are uncommon, then permitting such evidence should not upset a large number of verdicts nor provide a strong incentive for litigants, lacking a scintilla of probable cause, to fish the minds of jurors for the minnow of a mistake. The probability of finding a prejudicial communication would be too small, in the normal case, to hold any incentive for the investigation of jurors."

> "Permitting inquires of jurors regarding improper communications does not, in any event, stifle free debate in the jury room, bring the jury system into disrepute, or significantly increase the burden of jury service. On the contrary, such evidence is the backbone of 'the law's objective to guard jealously the sanctity of the jury's right to operate as freely from outside unauthorized intrusions purposefully made.' Remmer v. United States, 350 U.S. 377, 382. Unless litigants are free to prove improper influence and judicial remedies are available therefor, the jury system will be injured. The maintenance of public confidence in the jury system requires that the courts remain open to hear that the system was abused."

Although it was made unmistakably clear at the hearing that jurors were not asked to reveal any of their votes or deliberations (R. 33-4, 74-5), and there was no evidence that any juror had in fact revealed as much as a word of the deliberations, the judge opined that one of eighteen questions prepared for the interviewer by counsel did "not appear to relate to acts or declarations outside the jury room." Yet no one could reasonably interpret the question as calling for disclosure of acts or declarations inside the jury room, for it was framed one and one-half years after trial and expressly asked

for "names and dates of conversations [about the threats], proximity to trial, if possible." And, as earlier noted, none of the jurors who were interviewed apparently interpreted the question as calling for deliberations because none were revealed.

Ignoring the seventeen other questions and giving a distorted interpretation to the eighteenth, the court concluded that the jurors were asked an improper question. Because of this, apparently, the defense should be enjoined from asking any questions.

An even more fundamental misunderstanding is evidenced throughout the opinion, however: that everything which goes on in a jury room is sacrosanct. The court would apparently not permit disclosure of the fact that jury deliberations were carried on at the point of a gun. The most perplexing aspect of the court's premise in this regard is that the very case upon which it purports to rely, Mattox v. United States, 146 U.S. 149, reversed a conviction upon affidavits of jurors regarding statements made in the jury room during

deliberations. Several other authorities cited to, but ignored by the court, involved such communications. Chambers v. United States, 237 F.2d 573 (8th Cir. 1916); United States v. Kum Seng Seo, 300 F.2d 623 (3d Cir. 1962); Clark v. United States, 289 U.S. 1.

Under the mantle of "trimming the defendants' argument down to the area where it merits consideration," the court entirely disregarded defendant's arguments. Instead, it tailored itself a strawman: "jurors must always be open to unrestricted post-verdict inquiry and investigation." What defendants argued for was the constitutional right to inquire of jurors about prejudicial, extrinsic communications. Even that narrow and unexceptionable argument was not necessary to support the right to investigate in this case, for, unlike the petitioner in Parker v. Gladden, who "although unaware of any irregularities . . . commenced 'shooting in the dark'", 385 U.S. 363, 366 (dissenting opinion), the defense began its investigation with record evidence that prejudicial threats had reached the jury.

Ostensibly to protect jury-room deliberations, the judge concluded that it is improper not only to ask if a threat or other extrinsic communication affected the character or quality of the deliberations (a question which the defense had not asked), but also to inquire about the impact of a threat upon the juror's mind at the time, prior to the deliberations, that the threat was received. Thus, in the court's view, a juror cannot even be asked if the threat scared him or affected his belief in the defendant's guilt.

The judge quotes at length the instructions he gave to the jury not to discuss the case outside the courtroom. He concludes, amazingly, that these instructions "should have been sufficient to guarantee [Miller] a fair trial" (n. 3), choosing not to deal with the fact that, by their own admission, the jurors repeatedly disobeyed these instructions.

Acknowledging that prohibiting counsel from interviewing jurors about contaminating communications may occasionally cost a defendant his constitutional rights

the judge says that jurors will usually reveal improper communications to the court. He cites the fact that one of the jurors revealed the threats in this case as proof of that prediction, again overlooking the fact that numerous prejudicial communications -- including a report about exorbitant counsel fees and discussions thereof, a request of a state trooper for protection, and a discussion with that same policeman about the probable source of the threats -- were not disclosed to the court.

The most baffling conclusion in the entire opinion is that all of the questions asked of the jurors "were in no way related to a search for new communications." It was obvious at the hearing that the judge wanted to believe that this was the case, but the evidence was wholly to the contrary. Counsel repeatedly adduced evidence of new communications which were not disclosed at the trial, which were the subject of the investigation and which they claimed justified further investigation.

Having thus disregarded the facts, the court concluded that the investigation was designed merely to "rake up the past in an effort to find some basis for reading into it some features which the defense would like to stress on another motion for a new trial."[2] And since the court of appeals had affirmed his handling of the threats at the trial, that was "the law of the case."

The opinion's distortions and mutilations are more than matched by its repetition of platitudes in place of facts, reason, or authority. The court tosses off the truism that, "If third hand rumors of ambiguous threats from unknown sources would always require a mistrial or a new trial where discovered only after verdict - sinister or even innocently meddlesome persons could, with a few words, make a shambles of the jury system." The court thus reveals its evaluation of the evidence offered below,

2. While the efforts of the defense to protect the defendant from the prejudice of the threats, which began with a motion for mistrial during the trial, may fairly be called persistent, they can hardly be thought belated.

despite the absence of evidence that the threats were "third hand rumors" and despite the record fact that the juror was warned that he could expect bodily harm if he didn't return the right verdict. The newly discovered facts that the jurors were frightened, sought police protection, and were told by a policeman that the threats came from dope peddlers, are also apparently regarded by the court as too trivial to merit consideration. If the court were really concerned with preserving the jury system it should have granted a mistrial or a new trial. Nothing would more surely "make a shambles of the jury system" than general acceptance of the views adopted below.

The latest chapter in United States v. Miller is a source of bewilderment to counsel. One thing, however, clearly emerges: a remand for a hearing on the jury threats would be an empty remedy. The District Court has squarely held that it will not permit counsel to interview the juror-witnesses in preparation for a

hearing, and has clearly indicated that it will neither permit counsel to ask the witnesses any relevant questions at a hearing, nor grant a new trial if, despite all obstacles, an overwhelming case of prejudice is shown.

The defendant has been all but forgotten in the procedural poker played below. Slippery slogans and irrelevant axioms have obscured the fact that James Miller did not get a fair chance to establish his innocence. If justice is ever to be done in this case, it must be done by this Court.

Respectfully submitted,

STEVEN B. DUKE
W. PAUL FLYNN
RICHARD H. SIMONS

Counsel for Petitioner

April, 1968

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Criminal No. 11,191

UNITED STATES OF AMERICA

vs.

JAMES MILLER

RULING ON ORDER TO SHOW CAUSE

This is an application for an injunction to restrain the defendant, James Miller, his attorneys and their investigators from interviewing any members of the petit jury which on June 2, 1966, returned a verdict of guilty on an indictment charging the defendant with violation of 21 U.S.C. §§ 173, 174.

Eighteen months after the verdict, on December 2, 1967, the defendant and his counsel through private investigators employed by them undertook to interview all of the members of that jury. When this activity was brought to the attention of the court, an order to show cause why they should not be enjoined from making inquiry of any of those jurors was issued. The defendants filed responses and a hearing has been held.

It is important to recall what preceded their recent interrogation of the jurors in order to put the present proceeding in perspective. Nothing to the contrary having been shown, I take the legal and factual situation at the time the defendants commenced their inquiry to have

been as stated in Part VI of the opinion by the Court of Appeals in affirming the conviction of Miller, 381 F.2d 529, 538-40 (2d Cir. 1967).

"VI.

"When the trial was in its fourth week, the deputy clerk advised the judge that someone had talked to a juror about the case at a social gathering. The judge immediately brought the matter to the attention of counsel; defense counsel requested him to make inquiry without counsel being present and suggested that this be deferred for a short time until the taking of evidence was concluded and that the juror be cautioned in the meanwhile not to discuss the matter. When the judge spoke to the juror, it was discovered that he had already mentioned the incident to two others, like him residents of Litchfield, Conn., with whom he drove to court; the judge instructed him not to discuss it further and to give similar instructions to the two other jurors.

"After the taking of evidence had ended, the judge called the three jurors into his chambers. The juror reported that a man serving drinks at a cocktail party had said, 'I'm just going to warn you that another man in Litchfield told me that when this is over, that unless you're very careful that there is a bunch in Torrington who are going to get after you and beat you up. They don't want to kill you, but they don't like what is going on.' After pointing out that such a remark might have been intended either to intimidate a juror or to cause him to stiffen up, the judge inquired whether it would affect the decision of any of the

"three. All answered in the negative and assured the judge that no other jurors knew of the incident. The juror to whom the remark had been made then said he thought one of the others 'should mention something about that place over there.' This juror said there were two places in Torrington where his grandsons reported dope was being sold. He added 'that doesn't affect me any only to the extent I have grandsons, and so forth,' the suggestion apparently being that the judge should bring the matter to the attention of the authorities in order to stop further sales. On further questioning this juror affirmed, 'It has nothing to do with me. I will say it the way I see it.' On returning to court the judge denied a defense motion for a mistrial.

". . . Here there is no basis for doubting the ability of the three jurors to exercise the fair judgment they promised. The only way in which the judge might have handled the matter better would have been by interviewing the jurors individually as he had indicated he would, since this would have somewhat reduced the risk of a juror's being unwilling to admit susceptibility to extraneous influence. However, we cannot regard the joint interview as a misuse of the wide discretion accorded him. While the written motion for a new trial complained that the opportunity to cross-examine the three jurors was not granted or afforded defense counsel, that had been expressly waived in favor of inquiry by the judge. At the argument on the motion defense counsel referred to his attempts to interview the jurors, their consulting an attorney, and a

"suggestion by someone, presumably the attorney, that any interviews be held in abeyance pending an order from the judge; he sought a two week adjournment to permit such interviews. The judge declined to grant this and denied the motion for a new trial. We find no error in this . . . . Here the judge had developed the facts by interrogating the jurors, with counsel agreeing not to be present; there was thus no occasion for subjecting the jurors to a further inquiry. Cf. United States v. Crosby, 294 F.2d 928, 949-50 (2 Cir. 1961), cert. denied sub nom. Mittelman v. United States, 368 U.S. 984 (1962); United States v. Dardi, 330 F.2d 316, 332 (2 Cir.), cert. denied, 379 U.S. 845 (1964)."

Subsequently, on September 27, 1967, the defendant made a motion for a new trial grounded on newly discovered evidence. This motion was denied on November 21, 1967. United States v. Miller, 277 F. Supp. 200 (D. Conn.).

The next move by the defendant was on a course of conduct which precipitated the issuance of the order to show cause now being considered. What occurred within a few days after the motion for a new trial was denied is sufficiently recounted in the defendants' own brief which they filed in this proceeding, excerpts from which follow:

"On Friday, December 1, 1967, one of the attorneys for James Miller, Mr. Richard Simons, met with Virginia Samon, a private investigator employed by the Diamond Detective Agency, 11 Beacon Street, Boston, Massachusetts. Miss Samon was instructed by Mr. Simons to contact some or all of the

"persons who served as jurors in the case of United States v. Miller and to inquire of them whether they knew of the threats in the case and whether they were influenced thereby. Miss Samon was told by Mr. Simons not to ask the jurors about anything other than the threats and that if they insisted on discussing other aspects of the case, to leave if and when she politely could.

"Later on the same day Miss Samon met with Mr. Duke, also one of the attorneys for James Miller. Mr. Duke discussed the threats with her, gave her a copy of the petition for certiorari, discussed with her his theory about the threats and gave her a copy of the transcript of the colloquy between the judge and the three jurors [during the trial] . . . . He pencilled a number of questions in the margin of the transcript. Mr. Duke instructed Miss Samon to introduce herself as a private investigator. He also told her that if any jurors were reluctant to discuss the threats with her, she should inform them that the United States Attorney had stated in open court that the defense was free to investigate the matter, and that if they had any doubts, they should call the United States Attorney.

"On December 2, 1967, Miss Samon contacted five persons who had served as jurors. Among them were the three who had acknowledged at the trial that they were aware of the threats. She attempted to ask them about the threats, but some were unwilling to discuss the case at all . . . .

"The evening after the first day's investigation, Miss Samon reported to Mr. Duke. She also told him that she was introducing herself as a private investigator working for Professor Duke of the Yale Law School, one of the attorneys working on the appeal. After assuring himself that Miss Samon was making clear to the jurors that she was not engaged in scholarly research, but that Professor Duke was acting in the capacity of an attorney, he approved her method of introduction.[1] Thereafter, as on the first day, Miss Samon continued to introduce herself as aforesaid.

"On December 3, Miss Samon saw one or two more jurors.

"Some time between December 4 and December 10, Mr. Duke prepared two sets of questionnaire-form instructions for Miss Samon. One set was for the three jurors who discussed the threats with the judge during the trial. The other set was for all other jurors contacted . . . .

"The investigation was continued on December 17 and 18, 1967, with Miss Samon using the questionnaires prepared by Mr. Duke. Since some of the questions related to matters which had been discovered in the earlier part of the investigation, Miss Samon was directed to return to jurors already contacted and to attempt to get answers to the new questions from them. She contacted several jurors that weekend, bringing the total number contacted to 8 or 9." (Memorandum Re Order to Show Cause, pp. 2-3).

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1. Mr. Steven Duke is indeed a Professor of Law at the Yale Law School.

As always it is important to reach the precise question presented. One path to that end is to note what is not involved. It is not disputed that out-of-court statements made to a juror during the course of a trial may, if prejudicial to a losing party, warrant a new trial, cf. Remmer v. United States, 347 U.S. 227 (1954), nor that testimony of jurors is admissible to prove that improper statements have been communicated to a juror. Cf. Mattox v. United States, 146 U.S. 140 (1892); Remmer v. United States, 347 U.S. 227. But these rules do not deal with the questions to what extent and by what method a losing litigant may undertake direct inquiries of jurors after they have given their verdict. These are separate questions presented by this application for an injunction.

The Extent of Inquiry

Miss Samon, the investigator employed by the defendant, was instructed by Attorney Simons and Attorney Duke before she went out to interview the jurors. In complying with those instructions, she sought to obtain answers to two questions: (1) How were the threats communicated to you? (2) What effect did they have? It is obvious that the first has to do with the manner in which an extraneous communication, possibly prejudicial, had reached a jurors. The second probes into matter resting in his personal consciousness. The consequence of this differential analysis is a sharp discrimination in favor of the use of the answer to one and against the use, in any sphere, of the answer to the second.

In pointing out this basic distinction between what may and what may not be established by the testimony of jurors to set aside a verdict, the Supreme Court in Mattox v. United States, 146

U.S. at 149, approved "as conformable to right and reason and sustained by the weight of authority" the rule as expressed in Woodward v. Leavitt, 107 Mass. 453 (quoted by the Supreme Court in Mattox at 149):

> "that on a motion for a new trial on the ground of bias on the court of one of the jurors, the evidence of jurors as to the motives and influences which affected their deliberations, is inadmissible either to impeach or to support the verdict. But a juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind. So a juryman may testify in denial or explanation of acts or declarations outside of the jury room, where evidence of such acts has been given as ground for a new trial." (Underscoring added).

See also Wheaton v. United States, 133 F.2d 522, 526 (8th Cir. 1943).

The defendants' own brief discloses that they are aware of the distinction and of the underlying basis for it. They say:

> "Of course, not all evidence which could conceivably be obtained from jurors is admissible in court. A clear distinction should be drawn between evidence relating to improper communications and a juror's impeachment of the verdict by testifying to the reasoning processes of himself or others, or by claiming that he or someone else misunderstood the evidence or the instructions. Such testimony is rarely admissible because it would encourage losing parties to bring improper influences to bear upon former jurors, permit harassment and make it virtually impossible to determine disputes with finality. Further, public revelation of reasoning processes,

"debates and deliberations would hinder free discussion in the jury room, deter citizens from serving on juries, and bring the jury system and the courts into disrepute." (Memorandum Re Order to Show Cause, p. 8).

From Miss Samon's testimony and affidavit, and from the list of questions prepared by Mr. Duke for her guidance in interrogating the jurors, it is clear that her discussions with the jurors spilled over into areas which touched upon the jurors' reactions to many facts and circumstances other than their awareness of the extraneous communication relating to the case. This was not inadvertent - Mr. Simons instructed her to seek answers to two questions: (1) How were the threats communicated to you? (2) What effect did they have? Several of the questions Mr. Duke instructed her to ask blurred the distinction between whether there was a receipt of a communication from an outside source and what effect any such communication had on the minds of the jurors. One question on the list he gave her to be used when interviewing the three jurors who did know of the rumor of a "threat" read:

> "12. When you have discussed the threats with any of the other 9 jurors, what have you said about them? How did the other juror or jurors react? (names and dates of conversations, proximity to trial, if possible)"

This question carried at the very least, an implication of misconduct by those jurors - since they had been instructed by the court during the trial not to discuss the matter with any of the

other jurors. It does not appear to relate to "acts or declarations outside of the jury room." Mattox v. United States, 146 U.S. at 149. And the questions to be posed to the 9 remaining jurors all proceeded on the assumption that they had heard of the rumored threat before the verdict. In spite of inquiries put to 5 or 6 of the other jurors, none of them has made an affidavit or is reported to have said that he or she knew of the rumored threat prior to the rendition of the verdict.

The Jury

The dominant importance of the jury as an institution for assuring the justice of our method for determining facts and rendering verdicts in the operation of our judicial system is conspicuously stressed by the constitutional requirements of art. III, § 2, cl. 3, and the sixth and seventh amendments for trial by jury. Its unique character has been described by Mr. Justice Williams O. Douglas in his Almanac of Liberty, p. 112 (1954) as follows:

> "A jury reflects the attitudes and mores of the community from which it is drawn. It lives only for the day and does justice according to its lights. The group of twelve, who are drawn to hear a case, makes the decision and melts away. It is not present the next day to be criticized. It is the one governmental agency that has no ambition. It is as human as the people who make it up. It is sometimes the victim of passion. But it also takes the sharp edges off a law and uses conscience to ameliorate a hardship. Since it is of and from the community, it gives the law an acceptance which verdicts of judges could not do."

A jury is not required to elaborate its answer, and its ratiocination may not be probed, either secretly by recording or listening to them while they are deliberating, 18 U.S. C. §1508, or by questioning them about it in open court after they have rendered their verdict. Mattox v. United States, 146 U.S. 140.

Its independence from outside interference in the performance of its duty is protected by the imposition of criminal sanctions, 18 U.S.C. §§ 1503, 1504 (obstructing justice), and of civil liability, 42 U.S.C. § 1985(2) (intimidation) upon those who would interfere. Despite this immense trouble which is taken to protect a trial jury from being given knowledge of any outside information from which it might draw a false inference, such information does occasionally penetrate the net of protection with which they are surrounded. Then the need arises to balance the value of keeping the jurors inarticulate and of ascertaining whether harmful outside information was received by them.

The Issue

The question presented is how to chart a course that permits jurors' testimony to be obtained to establish improper communications while at the same time insulating them from the harassment of unlimited post-trial inquiry.

The defendants contend for an unrestricted right to investigate: "The defense is entitled to ordinary advantages of investigative technique and to the relaxed atmosphere of an interview in a place and at a time convenient to the

witness."[2] (Memorandum Re Order to Show Cause, p. 14).

Trimming the defendants' argument down to the area where it merits consideration, I take it to be this: If a juror's affidavit that an extraneous communication, possibly prejudicial, has come to his attention during the trial may be used to support a motion for further inquiry into the matter in a court proceeding, it follows that jurors must always be open to unrestricted post-verdict inquiry and investigation. While this may be tenable, I do not share it.

The point is made that without such inquiry extraneous communications will never come to light. But let us observe the matter more closely. Perhaps not all jurors will in every case report such communications during the trial of a case. However, the number of cases in which possibly prejudicial communications appear to have been voluntarily reported to the court or the parties furnishes a strong indication that a jury is not only the conscience of the community, but that the individual jurors are themselves men and women of good conscience.

Furthermore, to encourage the jurors in this case to promptly come forward with information of any attempt made to exert any extraneous influence upon them, the court instructed them at the end of the very first day of trial as follows:

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2. Indeed, every effort to employ that technique was followed here. Miss Samon, a young, attractive, and skillful investigator, was able to put most of her subjects at ease. The approach she adopted would tend to minimize whatever awareness they may have had of their privilege not to disclose any information about their state of mind or what transpired in the jury room. Cf. Escobedo v. Illinois, 378 U.S. 478 (1964).

"Before you go, I instruct you that you are not to talk about this case to anyone, not even among yourselves, and not to permit anyone to talk to you about it. If anyone should approach you or should commence to talk about it in your presence, or if anyone puts himself in a position to communicate with you about this case, report it to me." (Then followed some instructions to avoid paying any attention to reports about the case in the newspapers or on the radio and television, following which the court concluded:)

"I shan't repeat this every day, but I may from time to time. It is a continuing instruction, and please abide by it." (Trial transcript, pp. 55-56, May, 3, 1966).[3]

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3. Two days later: "I think we will suspend at this point for the day. I haven't cautioned the jury for a few days, but I hope you will remember my instructions to you about not permitting anyone to talk to you about the case. . . ." (Trial Tr. p. 506, May 5).

At adjournment for the day on May 10th: "And the jury will bear in mind the caution that I have expressed every day to you: Don't talk about the case, don't permit anyone to talk to you about it." (Trial Tr. p. 891).

See also Trial Tr. pp. 1720-1722, and Trial Tr. p. 2125 on May 19th. Sheppard v. Maxwell, 384 U.S. 333, 358 (1966) suggests that such instructions should "have been sufficient to guarantee [Miller] a fair trial."

While there is no need to theorize whether instructions of this nature may always serve to flush extraneous communications to a juror into the open, the fact is that in this case; as in Remmer v. United States, 347 U.S. at 228, a juror did report the incident to the judge.[4]

And staying with the case at hand puts the answer to the question raised by this proceeding on objectively firmer ground. It is clear that the two questions which Mr. Simons instructed Miss Samon to put to all jurors, and the set of 18 questions for the 3 jurors who knew about the rumored threat as well as the set of 11 questions[5] for the other jurors which Mr. Duke instructed her to ask were in no way related to a search for new communications. Primarily they were designed to elicit what effect the communication already disclosed had on them during their deliberations.

The defendants make the argument that jury interrogation is not all of one kind. True, the levels at which an inquiry is conducted may be distinguished. But in this case, the trial court had the duty of further inquiry concerning the

4. But cf. Parker v. Gladden, 385 U.S. 363, 366 (1966) (dissenting opinion).

5. Undoubtedly one is faced with formidable problems of communication in trying to assess what went on in another person's mind. The likelihood is that many questions may be necessary.

out-of-court statement to the juror. It was the court's primary responsibility to consider the realities of the situation and determine whether the communication was likely to have a prejudicial effect upon the impartiality of those jurors. Cf. United States ex rel. Bloeth v. Denno, 313 F.2d 364 (2d Cir.) (en banc), cert. denied, 372 U.S. 978 (1963). The manner in which this was done and the determination the court reached were squarely tested and affirmed on appeal. United States v. Miller, 381 F.2d 529. The Court of Appeals decided that "there was thus no occasion for subjecting the jurors to further inquiry." (at 540). For me that became the law of the case. It appears, however, not to have been sufficiently reliable guidance to counsel for the defendant. Cf. Dictograph Products Co. v. Sonotone Corp., 230 F.2d 131, 134-36 (2d Cir.), petition for cert. dismissed per stipulation, 352 U.S. 883 (1956).

The fact that a jury has been discharged from further service in a case after it has rendered a verdict does not bring to an end the safeguard of the court's protection against inquiry into their deliberations. United States v. Driscoll, 276 F. Supp. 333 (S.D. N.Y. 1967); United States v. Dardi, 330 F.2d 316, 332 (2d Cir.), cert. denied, 379 U.S. 845 (1964). The values to be protected by insulating jurors against post-verdict inquiry into their motives for decision have been well stated by Circuit Judge J. Joseph Smith, whose judicial experience embraces some twenty years' service as a trial judge in the federal system:

> "There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and temptations

for tampering ought not be increased; verdicts ought not be made so uncertain. Whenever information erroneously reaches the ears of the jury in open court, the judge's instruction to disregard it may be disobeyed; yet it is not suggested that in such a case the jury ought be polled as to whether any of them relied on the forbidden knowledge. Even though presumably the jurors themselves know best, the question is determined, as is the question whether an error was prejudicial, on the basis of the nature of the matter and its probable effect on a hypothetical average jury. The same reasons apply when the improper knowledge reached the jury outside the courtroom. It was not error to refuse to examine the jurors as to their mental processes." United States v. Crosby, 294 F.2d 928, 950 (2d Cir. 1961), cert. denied, 368 U.S. 984 (1962).

See also Memorandum Re Order to Show Cause, p. 8 (supra at 7-8).

If third-hand rumors of ambiguous threats from unknown sources would always require a mistrial - or a new trial where discovered only after verdict - sinister or even innocently meddlesome persons could, with a few words, make a shambles of the jury system. See McDonald v. Pless, 238 U.S. 264, 267-68 (1915).

To maintain the integrity of our jury system for reaching final decisions requires that its internal process shall be inviolable, even in court proceedings. Any inquiry outside that area which may be permitted of them ought be adequately restricted to safeguard that integrity. The

objectives of the safeguard lie primarily in the protection of their integrity and independence, rather than in the reliability of the processes for determining their verdict. See Stein v. New York, 346 U.S. 156, 178 (1953) and cases there cited. It is far-fetched to assume, even arguendo, that the particular information sought by the post-trial inquisition of the jurors undertaken in this case justified it, but since that inquiry has been conducted, the question is how it should have been done. This is plainly a question of method.

The Method of Inquiry

A balance between those understandable values which are safeguarded by forbidding post-verdict interrogation of jurors against the right of an accused to protection from possible harmful effect of outside communications to a jury can best be realized by requiring that an application for permission to make any post-verdict inquiry of jurors be made to the court. The inquiry itself ought preferably be conducted in open court. In this district, the voir dire examination of jurors for qualification, bias or prejudice for the purpose of intelligent exercise of challenges for cause or pre-emptorily is in writing to the court, who then asks those questions which are appropriate to the circumstances of the case for which a jury is being selected. Perhaps inquiry by deposition on notice from the court might be appropriate in some cases. That method would also serve to insure that the interrogation would be made by lawyers,[6] who could be expected to confine their questions to the

6. Distortion can more readily occur in the absence of counsel's aid.

limited area within which the juror was a witness as distinguished from happenings in the jury room concerning which his role was that of a juror. Under either method, there would be an incontestable record. These two methods are permissible in a proper case.

The one adopted by the defendants was not. At least one juror was provoked, even by Miss Samon, to become "very angry" when she paid him a return visit at his home on a weekend. This in turn induced the juror's wife, while in her husband's presence, to apologize to Miss Samon for his outburst. It appears he was harassed from two sides. More than one interview was conducted in the presence of a juror's wife who interjected some remarks into the discussion. Another one of the 3 who knew of the rumored "threat" refused to discuss the case. This did not deter Miss Samon from making another visit to him to get him to talk.

Any person unwilling to submit to an interview "may insist that his views or testimony be given only upon deposition or at trial or other court proceeding . . . ." Devlin v. Rosman, 205 So. 2d 346, 347 (D. Ct. App. Fla. 1967) (per curiam). A juror ought not even be burdened with the necessity of insisting that he does not wish to be interviewed. Leaving jurors at the mercy of investigators for both sides to probe into their conduct would make the already difficult task of obtaining competent citizens willing to serve as jurors well nigh impossible. In this case, the whole purpose of the jury investigation conducted by the defendants was to rake up the past in an effort to find some basis for reading into it some

features which the defense would like to stress on another motion for a new trial. The line of inquiry to the jurors who knew of the rumored "threat" comes perilously close to an attempt to challenge the integrity of their assurances of impartiality to the court. But the credibility of a juror's statement about that was a collateral factor, cf. United States v. Mentesana, 305 F.2d 214, 216 (2d Cir. 1962), cert. denied, 375 U.S. 848 (1963), to the larger issue which called for an assessment of whether, under all the circumstances, what he had heard would be likely to impair his honest impartiality. That issue was for the court, see United States ex rel. Bloeth v. Denno, 313 F.2d at 372, and in resolving it at the time it arose, demeanor evidence was taken into account. Cf. United States v. Letchos, 316 F.2d 481, 485 (7th Cir.), cert. denied, 375 U.S. 824 (1963).

The Conduct of Defendant's Counsel

At the hearing, the court did not ask for nor did Mr. Newman insist on producing juror No. 5 who had reported to him that on a Sunday two women had come to this home and said that at the request of a professor of the Yale Law School they wanted to talk to him and ask him how he felt about the Miller case. It is not important to pin this down. Miss Samon's affidavit and her testimony make it clear that the scope of the juror inquiry was intended to and did extent into matters which could not be received as evidence because of a rule that is designed to protect the public interest. A formulation of the rule is found in Rule 11(d) among the local Rules of Civil Procedure.7 The defendants

7. Rule 11(d) "Secrecy of Jury Deliberations. Jurors shall not at any time be inquired of by counsel or any other persons, or answer, as to the deliberations or the vote, of any individual juror at any stage of the jury's deliberations except in a proceeding in open court."

argue that because two other Civil Rules are expressly made applicable to criminal cases it would not be fair to hold that Rule 11 should be held applicable to criminal cases by implication. Mr. Newman expresses the same view. I agree that it would be manifestly unfair to extend that rule to this criminal case for the first time as a ground for censuring the conduct of counsel. Also the Court of Appeals statement that "there was thus no occasion for subjecting the jurors to further inquiry" (381 F.2d at 540) may well be read in the context of the inquiry by the court during the trial. The question of future inquiry by counsel for the defense was not in issue.

One would be doing rather less than justice to the defendant's counsel if one were to suggest that directing inquiry into what effect the rumored threat had upon the jurors arose out of counsel's oversight of the judicial rule which would require the court to reject the evidence they sought to obtain.[8] Mattox v. United States, 146 U.S. 140. However, I am satisfied that this came about because of the fervent belief in their cause that comes with involvement, rather than from any intention to proceed without any regard for nice distinctions which the cases have expressed. Their immediate and voluntary cessation of the jury investigation when the order to show cause was served upon them fortifies my opinion that they acted in good faith. No disciplinary action is called for under these circumstances.

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8. There is little doubt that such conduct by an officer of the court may be proscribed, Sheppard v. Maxwell, 384 U.S. 361, and even punished as contempt. 18 U.S.C. §

However, an injunction should issue. Accordingly, the defendant, James Miller; his counsel, Steven Duke, W. Paul Flynn, and Richard H. Simons; and Richard B. Lane and Virginia Samon; and their agents, investigators, representatives, employees and attorneys, and all persons acting at their request or direction, are enjoined from making any inquiry of any of the jurors who comprised the petit jury which heard and decided the above captioned case, except upon further order of the court.

The foregoing constitutes the court's finding of facts and conclusions of law.

SO ORDERED.

Dated at Hartofrd, Connecticut, this 28th day of March, 1968.

M. JOSEPH BLUMENFELD
United States District Judge

A D D E N D U M

I.

Before the defendants filed their responses to the order to show cause, they filed other motions. One was a Motion to Confirm Right of Defense to Investigate. As I observed at the hearing, that presented the other side of the coin to the order to show cause why the defendants should not be enjoined from further investigation of the jury. Accordingly, that motion is denied.

II.

The defendant Miller has also filed an Amendment of Motion for New Trial. This is grounded on allegations to the effect that the defendant was adversely prejudiced by the same communication to the jurors discussed above. Accompanying that motion was an Application for Issuance of Subpoenae to jurors 6, 8 and 9, those who knew of the communication. The ground for this application is stated, "there is on file a motion for new trial alleging that there was actual prejudice to the defendant by the communication of an alleged threat to jurors 6, 8 and 9 in the above styled cause."

It is not clear whether the scope of the Amendment to Motion for New Trial extends beyond what was before the Court of Appeals for decision in United States v. Miller, or is merely an attempt to explore the jurors' reactions to the extraneous communication in greater depth. Whichever it may develop into after hearing is had on it, there are valid reasons why the court should not consider the motion at this time. No harm can result from preserving the status quo for a time. The mandate of the Court of Appeals has been stayed under its Rule 28. The defendant is at liberty under bond. He has already had the benefit of some interview with the 3 jurors. And Miss Samon's affidavit appended to the motion in this court was presented to the Supreme Court along with a brief in support of his application for certiorari. Miller v. United States, petition for cert. filed, 36 U.S.L.W. 3229 (U.S. Nov. 24, 1967) (No. 857). I deem it advisable to defer acting on the motion until after the defendant's application for certiorari has been acted upon.

March 28, 1968,
Hartford, Connecticut

M. JOSEPH BLUMENFELD
United States District Judge

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 857

JAMES MILLER, A/K/A FRANK JAMES COPPOLA,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to petitioner's supplemental memorandum. For the reasons noted below, we submit that the claims advanced are irrelevant to the issues presently before the Court. Moreover, in light of petitioner's vigorous attack upon the district judge, we believe it appropriate to set that court's action in its proper context.

Having learned that, eighteen months after the verdict, private investigators employed by petitioner's counsel had begun interviewing members of the jury, the district court issued an order to show cause why further interrogation of the jurors should not be enjoined. Petitioner's counsel filed responses to this or-

der and a hearing was held. On the basis of affidavits submitted by petitioner, it appeared that an investigator employed by counsel had questioned eight or nine of the jurors (App. 6).[1] In at least one case, the investigator returned to question a juror who had indicated earlier that he did not wish to discuss the case (App. 18). Another juror became "'very angry' when [the investigator] paid him a return visit at his home on a weekend" (App. 18).

The district court framed the issue before it as follows (App. 11):

> The question presented is how to chart a course that permits jurors' testimony to be obtained to establish improper communications while at the same time insulating them from the harassment of unlimited post-trial inquiry.

The district judge concluded that, in order to prevent undue harassment of the jurors, the permission of the court should be required before an investigation is undertaken. He also suggested that it was preferable that any examination of the jurors should take place in open court. The court noted, however, that in some instances it might be appropriate to have the jurors examined by deposition.

Having decided that further out-of-court interrogation of the jurors should be terminated, the district court enjoined petitioner's counsel and his private investigator "from making any inquiry of any of the jurors who comprised the petit jury which heard and

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[1] References are to the district court's opinion, which is set forth as an Appendix to Petitioner's Supplemental Memorandum.

decided the above captioned case, except upon further order of the court" (App. 21). In making this ruling, however, the judge expressly noted that he was not passing on any claims by petitioner that he was entitled to a new trial because of improper communication to the jurors. He noted that petitioner was free on bail and that the case was pending in this Court. He, therefore, determined that further action on petitioner's motion for a new trial should be held in abeyance pending this Court's disposition of the petition for a writ of certiorari (App. 22).

It is evident that the district court has neither unreasonably restricted petitioner's ability to question the jurors about possible improper communications, nor passed on the merits of petitioner's claim that information gathered after the trial from the jurors and others shows that he is entitled to a new trial. All that the trial judge decided was that the jurors should not be harassed by further visits from petitioner's investigator and that if further interrogation of the jurors was necessary it should take place under the strict supervision of the district court. Thus, the decision has no bearing on issues that are ripe for consideration by this Court. Nor, we add, do the actions taken by the trial judge reflect upon his ability to conduct properly any further proceedings that may result from petitioner's motion for a new trial.

For the reasons stated herein and in our original brief in opposition in this cause, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD.
Solicitor General.

APRIL 1968.

U. S. GOVERNMENT PRINTING OFFICE: 1968

SUPREME COURT, U. S.

JUL 10 1968

JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

October Term, 1967

No. 857

JAMES MILLER, a/k/a FRANK JAMES COPPOLA
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 857

JAMES MILLER

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of June 17, 1968, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed November 24, 1967.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. On June 11, 1968, this Court granted the petition for certiorari in *Leary v. United States* (No. 1365, 36 L. Wk. 3469), wherein the constitutionality of the presumption under

21 U.S.C. §176a was challenged. Since this was squarely raised as question number three in the above petition, it would be unjust to send the petitioner herein to prison while this Court is considering the same issue he raised several months before petitioner Leary. Moreover, since the validity of §176a is of substantial consequence in the administration of criminal justice, a second brief on the matter developed from a different perspective would surely assist the Court in resolving the issue.

2. On March 19, 1968, this Court held in *Simmons v. United States* (36 L. Wk. 4277), for the first time, that unfairly suggestive use of photographs in obtaining identifications from eye witnesses may deny due process of law or require reversal of a federal conviction in the exercise of this Court's supervisory authority. There was such unfairly suggestive influence in this case and it was complained of under the fifth question presented in the petition. Since it was labelled only as "basic unfairness," however, the Court presumably overlooked the point, which was elaborated on pp. 25-27 of the petition and pp. 14-15 of the reply brief.

3. The United States Attorney moved, in the above entitled case, to have petitioner committed to prison on June 24, 1968 or as soon thereafter as Mr. Justice Harlan should deny petitioner's application for suspension of the order denying certiorari in the above entitled case. Petitioner opposed the motion and moved for stay of execution, on eight separate grounds, including the facts that: (1) the defense had discovered on May 15, 1968, that the prosecution had hypnotized its chief eye witness prior to trial and had not disclosed that fact prior to, during, or after trial, though subsequently acknowledging the fact by letter of June 7, 1968; (2) on the same date, the

defense learned that the eye witness, Mike Caron, was so disturbed prior to trial, while in prison and subject to interrogation, that he attempted suicide; (3) newly discovered evidence, in the form of expert psychiatric opinion, indicates that Caron's credibility was cast into considerable doubt by the emotional upsets, the suicidal disposition, the sensory deprivations, and the hypnosis, none of which were revealed prior to or during trial. *Cf. Giles v. Maryland*, 386 U.S. 66 (1967); 18 U.S.C. §3500; (4) the defense recently discovered evidence, from witnesses whose statements have been recorded and who express their willingness to testify, which conclusively shows that petitioner is innocent of the crime of which he was convicted. All the foregoing evidence was submitted to the trial court in support of the application for stay on June 24, 1968. The trial court's response (similar to its attitude toward the jury threats, see Petitioner's Supplemental Memorandum in Support of Petition for Certiorari) was that petitioner had had a jury trial, the jury convicted him, and that was that. Petitioner's motion for stay was denied and the Government's motion granted.

It is submitted that while the foregoing evidence is not part of the record below (it is contained, however, in applications for suspension of the order denying certiorari, on deposit with the clerk of this Court), it gives color, meaning, and context to the claims made in the petition, especially those in point five thereof, and that this Court, recognizing the injustice done to petitioner and the irreparable harm to petitioner and to the cause of justice that a further trip through the courts will require, should grant the petition for certiorari and rule upon the claims made in the petition.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiori, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

STEVEN DUKE
W. PAUL FLYNN
RICHARD H. SIMONS
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

W. Paul Flynn

CERTIFICATE OF SERVICE

I hereby certify that five (5) copies of the foregoing Petition for Rehearing were mailed to the Solicitor General of the U.S. on July 9, 1968.

W. Paul Flynn